Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

DONALD P. ROPER,
Superintendent, Potosi Correctional Center,
Petitioner,

v.

WILLIAM WEAVER,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

APPENDIX TO PETITION
VOL. II OF II

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 99-3462

William Weaver,	*
	*
Petitioner-Appellee,	*
	*Appeal from the United States
v.	*District Court for the Eastern
	*District of Missouri
Michael Bowersox,	*
	*
Respondent-Appellant*	

Submitted: June 13, 2000
Filed: February 23, 2001

Before BOWMAN, MORRIS SHEPPARD ARNOLD, and BYE, Circuit Judges.

BYE, Circuit Judge.

The State of Missouri appeals from the judgment of the district court granting William Weaver's petition for habeas corpus relief under 28 U.S.C. § 2254. The district court determined that Weaver's Fourteenth Amendment rights under the Equal Protection Clause were violated when the state prosecutor exercised two peremptory strikes against black venirepersons during Weaver's murder trial. We reverse; we also remand to the district court to address the remaining twenty-one issues raised in Weaver's petition.

BACKGROUND

On July 19, 1988, a St. Louis County jury convicted Weaver, a black male, of first-degree murder for the death of Charles Taylor. The following day the jury sentenced Weaver to death.

During jury selection, the prosecutor exercised seven of his nine peremptory strikes on white venirepersons and the remaining two on black venirepersons, leaving a jury comprised of nine whites and three blacks. Weaver challenged the two strikes against black venirepersons, relying upon the Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The state trial court held a hearing at which the prosecutor explained his peremptory strikes by stating

> there's not a pattern of discrimination or systematic exclusion. There are three blacks on the jury, which is 25% of the jury, which I think is significantly higher than the black population in St. Louis County.
>
> The two blacks I struck with my peremptory strikes were not because the people were black but for other reasons. Let's see. Juror number 27, Ms. Burns, I struck her for a number of reasons: One, in the death penalty phase, although she said she could impose the death penalty, I wasn't persuaded that she could. I thought she said it with some reluctance and some hesitation. I also couldn't maintain eye contact with her. I know bad vibrations and bad chemistry between a lawyer and a prospective juror doesn't carry great weight with the Court or, at least, the Court of Appeals, but I think it's a legitimate

reason for the attorney to strike someone.

In any event, I was not persuaded that she could give the death penalty, particularly to a fellow black person. I didn't think she was strong enough. I observed her a lot of times cutting up and talking to the black gentleman next to her, Mr. Innman, who I have left on the jury by way of my strikes. And I simply felt that she would not be a fair and impartial juror.

With regard to juror number 54, Ms. Newsome, I felt that she was a weak person, both during voir dire on the death penalty, and on the voir dire-just the general voir dire, although Ms. Black conducted most of it. My impression of her was that she was not particularly bright and I struck a couple of white people for that very same reason. I thought in a case like this I needed intelligent people. I didn't figure she qualified in that regard and I thought she took the whole matter rather frivolously.

But in any matter, Judge, of nine peremptory strikes, I have used only two to strike blacks. Seven were used to strike whites. I have left three blacks on the jury, even though I have enough peremptory strikes to attempt to remove all five.

...

Perhaps I misstated my case somewhat with Ms. Newsome when I say intellectually weak. What I really meant is her personality struck me-granted, she did try hard to get on the jury, which showed civic minded interest; but in

> those interviews with the Court, she just struck me as a person that was a weak personality where the death penalty is involved, and I didn't think she would be able to vote for the death penalty.

In evaluating the Batson claim, the state trial court observed that three of the jurors remaining on the panel were black, and also that the alternate juror was black. The trial court denied the Batson challenge stating that, "the court does find that no prima facie showing of discrimination in the jury selection has been made."

Weaver brought post-conviction motions for relief in state court, which were denied. He also appealed his conviction and sentence to the Missouri Supreme Court. Weaver's direct appeal was consolidated with his appeal from the denial of his post-conviction motions. On December 19, 1995, the Missouri Supreme Court affirmed the conviction and death sentence. See State v. Weaver, 912 S.W.2d 499 (Mo.1995).

The Missouri Supreme Court analyzed the Batson claim differently than the trial court. Rather than reviewing the trial court's determination that the defendant had not established a prima facie showing of discrimination, on appeal the court focused on whether the prosecutor had offered race-neutral explanations for his peremptory strikes. The Missouri Supreme Court concluded that the prosecutor's stated reasons for striking venireperson Burns were race-neutral, and that no Batson violation occurred.

> What a prosecutor observes about a potential juror in voir dire, as well as what is said, may form a legitimate nondiscriminatory basis for exercising a peremptory strike. See Purkett, _____ U.S. _____, 115 S.Ct. at 1771. Those

> observations here included reluctance and hesitation in answering questions, lack of eye contact with the prosecutor, lack of strength, and "cutting up" and talking during voir dire. The prosecutor's explanation here was specific, race-neutral, and free of any racially discriminatory purpose. The trial court had the opportunity to observe the juror in question, listen to the manner in which she answered the questions, and to assess the prosecutor's demeanor and reasons for striking the juror.

Weaver, 912 S.W.2d at 509.

The Missouri Supreme Court also concluded that no Batson violation occurred with respect to venireperson Newsome:

> As to [Newsome], the state's reason for striking her was race neutral. By her words and conduct, [Newsome] led the prosecutor to believe that she was frivolous, had a weak personality or was intellectually weak, particularly where the death penalty was concerned. It is not inherently pretextual to say that in a capital case a prosecutor would want serious jurors that are of above average intelligence and not reluctant to impose the death penalty when appropriate.

Id. at 509-10.

PROCEDURAL HISTORY

On April 18, 1996, Weaver filed a pro se habeas corpus petition in federal district court. At that time, Weaver had not yet petitioned the United States Supreme Court for review of

the Missouri Supreme Court's decision affirming his conviction and death sentence. The district court dismissed Weaver's petition without prejudice so that he could fully exhaust his state remedies. Weaver petitioned the Supreme Court for a writ of certiorari, which the Court denied on October 7, 1996. Weaver v. Missouri, 519 U.S. 856, 117 S.Ct. 153, 136 L.Ed.2d 98 (1996).

On November 12, 1996, Weaver filed a second pro se habeas corpus petition in federal court. After the district court appointed counsel to assist Weaver in presenting his petition, Weaver filed an amended petition raising the Batson claim and twenty-one other issues.

Weaver's two petitions straddled the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (AEDPA) (effective April 24, 1996), which set new standards that curtail the federal courts' review of constitutional challenges to state custody. See generally, Williams v. Taylor, 529 U.S. 362, 120 S.Ct. 1495, 1518, 146 L.Ed.2d 389 (2000) (O'Connor, J., concurring, writing for five Justices on this point).

On August 9, 1999, the district court granted Weaver a writ of habeas corpus. The district court held that the state trial court improperly applied Batson's three-step process for analyzing a prosecutor's use of peremptory strikes.[1] Citing

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[1]Batson 's three-step process first requires the defendant to make a prima facie showing that the prosecution exercised one or more peremptory challenges based on race. Second, after a prima facie showing is made, the burden shifts to the prosecutor to give a racially neutral explanation for the challenge. Third, the trial court must decide whether the defendant has established purposeful discrimination. See

Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), the district court decided that the state trial court applied Batson unreasonably-instead of considering whether the prosecutor's articulated reasons for the peremptory strikes were race neutral, the state trial court merely found that the defendant had made no prima facie showing. Hernandez holds that a defendant's prima facie requirement becomes moot if a prosecutor offers a race-neutral explanation before the court rules that the defendant made a prima facie showing. See Hernandez, 500 U.S. at 359, 111 S.Ct. 1859.

In addition, the district court independently analyzed the prosecutor's stated reasons for striking venireperson Burns. The district court found that the prosecutor struck Burns for reasons which were not race neutral.

The district court did not specifically address whether Weaver's petition should be analyzed under AEDPA, concluding that a Batson violation had occurred even if the state trial court's actions were examined under the heightened standard. In addition, the district court addressed only the state trial court's decision, and did not consider whether the Missouri Supreme Court decision was contrary to, or involved an unreasonable application of Batson. After granting Weaver a writ based upon the Batson claim, the district court declined to address Weaver's remaining twenty-one claims.

DISCUSSION

I. Application of AEDPA

As a threshold matter, we must decide whether AEDPA, and its new standard of review, applies to Weaver's habeas

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Batson, 476 U.S. at 96-98.

petition. Weaver asks us to apply the pre-AEDPA standard. He filed his first petition on April 18, 1996, six days before AEDPA took effect. That petition was dismissed without prejudice for failure to exhaust state remedies. After exhausting state remedies, Weaver returned to federal court on November 12, 1996. He notes that, under pre-AEDPA law, the second filing constituted a mere continuation of the first filing, because the first was not adjudicated on the merits. See Sanders v. United States, 373 U.S. 1, 17, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963). Thus he argues that the standard in effect when he filed his first petition applies.

We disagree, AEDPA's provisions apply to all habeas corpus petitions filed after the Act's effective date. Lindh v. Murphy, 521 U.S. 320, 326, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). We hold that this rule applies even when a prisoner's original petition was filed prior to AEDPA's effective date and dismissed without prejudice for failure to exhaust state remedies. See Barrientes v. Johnson, 221 F.3d 741, 751 (5th Cir.2000); see also Mancuso v. Herbert, 166 F.3d 97, 101 (2nd Cir.1999).

Weaver's argument proves a different point. We agree that Weaver's second, post-AEDPA filing isn't a second or successive petition. See Slack v. McDaniel, 529 U.S. 473, 484-87, 120 S.Ct. 1595, 1604-05, 146 L.Ed.2d 542 (2000). But "whether a petition is a 'second or successive' application under the AEDPA is an entirely different question" than whether AEDPA applies to a petition filed after the Act's effective date. Mancuso, 166 F.3d at 101 n. 4; see Barrientes, 221 F.3d at 751 ("Whether the petition at issue will be considered 'second or successive' within the meaning of the Act is immaterial to the analysis"). For present purposes, then, the question is whether AEDPA applies; we hold that it does because Weaver's petition was filed after AEDPA's effective date.

II. Standard of Review

A state prisoner may seek a writ of habeas corpus in federal court if his confinement violates the federal Constitution or federal law. 28 U.S.C. § 2254(a). Under AEDPA, a federal court may grant such a writ only if the state court proceedings

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id. § 2254(d)(1) & (2).

Section 2254(d) distinguishes between two types of erroneous decisions-those of law and those of fact-and treats each in separate subparagraphs. Claims of legal error, whose review is governed by § 2254(d)(1), admit of even finer gradations. See Williams, 120 S.Ct. at 1519-20, 120 S.Ct. 1495 (delineating four separate categories of § 2254(d)(1) cases). Claims of factual error are subjected to the standard enunciated in § 2254(d)(2); section 2254(e)(1) then establishes a presumption of correctness in favor of state court findings of fact.

As a preliminary matter, then, we must identify the particular statutory provision that governs Weaver's case. Weaver challenges the state court's disposition of his Batson claim. We have held that each of the three steps of the Batson inquiry involves a determination of fact. See United States v. Moore, 895 F.2d 484, 485 (8th Cir.1990) (step one: prima facie

showing); Shurn v. Delo, 177 F.3d 662, 665 (8th Cir.1999) (step two: prosecutor's race-neutral explanations); United States v. Fuller, 887 F.2d 144, 146 (8th Cir.1989) (step three: court's ultimate finding on purposeful discrimination). Because Weaver's challenge necessarily involves a question of fact, we must review his claim under § 2254(d)(2). Accordingly, our review presumes that the Missouri courts found the facts correctly, unless Weaver rebuts that presumption with clear and convincing evidence. See 28 U.S.C. § 2254(e)(1). It bears repeating that even erroneous fact-finding by the Missouri courts will not justify granting a writ if those courts erred "reasonably." Cf. Williams, 120 S.Ct. at 1522, 120 S.Ct. 1495 (discussing the meaning of the word "unreasonable" as employed in § 2254(d)(1)).

III. The Batson Claim

A. The State Trial Court Decision

The state trial court rejected Weaver's Batson challenge, explaining that "no prima facie showing of discrimination in the jury selection has been made." We regularly defer to the fact-findings of trial courts because those courts are uniquely positioned to observe the manner and presentation of evidence. Our deference to trial court fact-finding is doubly great in the present circumstance because of the "unique awareness of the totality of the circumstances surrounding voir dire," Moore, 895 F.2d at 486, and because of the statutory restraints on the scope of federal habeas review.

First, a trial court's determination of the Batson prima facie step is highly fact-intensive. The determination is based largely upon information "that will not be evident from a reading of the record," such as the ability to "evaluate general demeanor; to observe attention span, alertness, and interest; and to assess reactions indicating hostility or sympathy towards or

fear of the parties." Id. at 485-86. Second, on habeas review, we accord state trial courts broad latitude in determining questions of fact by virtue of the statutory presumption in favor of state court fact-findings, see 28 U.S.C. § 2254(e)(1).

Weaver's showing falls short of rebutting the presumptive correctness of the state trial court's determination that Batson wasn't violated. Weaver points to the fact that the state trial court's express findings were limited to comments about the racial composition of the jury-a "numbers analysis." He directs us to our earlier precedent that a numbers analysis cannot, on its own, negate a prima facie case. See United States v. Johnson, 873 F.2d 1137, 1139-40 (8th Cir.1989). But Weaver advances no additional support for his claim that the state trial court determined the facts "unreasonably" in light of the totality of the evidence presented. See 28 U.S.C. § 2254(d)(2).

Contrary to Weaver's assertions, we believe that the district court's numbers analysis entails precisely the opposite conclusion. Our early Batson cases (decided during roughly the same time period as the instant state court decision) suggest that a numbers analysis is relevant in determining whether a defendant has established a prima facie case. E.g., Moore, 895 F.2d at 486 n. 5; United States v. Fuller, 887 F.2d 144, 146 (8th Cir.1989). Of course, the trial court's decision does not stand or fall on a numbers analysis alone. The state trial judge personally observed the venirepersons' demeanor during voir dire, and doubtless developed a sense for those their acumen. Likewise, the state trial judge personally observed the prosecutor during the exercise of peremptory strikes, and later when he explained his conduct.

In addition, we agree with the State of Missouri's contention that Weaver failed to provide additional evidence at the Batson hearing to establish a prima facie case. Weaver argued only against the weight of the race-neutral reasons

proffered by the prosecutor, without demonstrating that the prosecutor's reasons were pretextual.

In sum, the trial court's use of numbers analysis (a relevant factor), coupled with the court's unique opportunity to observe the entirety of voir dire, coupled with Weaver's failure to provide additional evidence at the Batson hearing, supports the state trial court's decision to deny Weaver's Batson claim. See Luckett v. Kemna, 203 F.3d 1052, 1054 (8th Cir.2000). Weaver has failed to overcome the statutory presumption of correctness afforded the state court's fact-finding. Because he cannot denigrate the state trial court's factual determinations, we cannot conclude that the state trial court's decision was "based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2).[2]

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[2]The district court concluded that Weaver's petition raised a § 2254(d)(1) challenge, namely, the state trial court's "unreasonable application of" Batson. The district court faulted the state trial court for analyzing the alleged violation under step one of the Batson analysis (prima facie showing), instead of moving to step two when the prosecutor gave race-neutral explanations for striking the black venirepersons. The district court erred in this respect. Weaver's petition raised Batson claims, which require factual determinations. As we explained above, § 2254(d)(2) governs federal review of state court factual determinations.

Even if subsection (d)(1) had applied, however, the district court's analysis was flawed. Weaver was tried in July 1988, nearly three years before the Supreme Court decided Hernandez v. New York, which holds that a defendant's prima facie showing is mooted when the prosecutor explains his strikes before the court can rule on the prima facie step. 500 U.S. at 359, 111 S.Ct. 1859. The state trial court can hardly be

B. The Missouri Supreme Court Decision

We also examine the Missouri Supreme Court's decision because it was based on different grounds than the state trial court decision. Cf. Ward v. French, 989 F.Supp. 752, 761 (E.D.N.C.1997) (addressing the presumptive correctness of factual findings made by both a state trial court and the North Carolina Supreme Court). The Missouri Supreme Court did not review the trial court's prima facie determination, but instead made its own express factual finding that the prosecutor gave race-neutral explanations for his two peremptory strikes. See Weaver, 912 S.W.2d at 509.

Findings of fact made by state appellate courts have the same presumptive correctness as findings of fact made by state trial courts. Cf. Sumner v. Mata, 449 U.S. 539, 546-47, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (applying the pre-AEDPA version of 28 U.S.C. § 2254(e)(1)); Jones v. Jones, 938 F.2d 838, 842-43 (8th Cir.1991) (citing Sumner v. Mata and addressing findings of fact made by Missouri appellate courts on a Batson claim).

As with the state trial court's fact-finding, Weaver has failed to rebut the presumptive correctness of the Missouri Supreme Court's determination that the prosecutor gave race-neutral reasons for striking two venirepersons. The only point that bears elaboration is the prosecutor's comment that

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faulted for failing to follow a Supreme Court decision that didn't exist at the time of Weaver's murder trial. Cf. Luckett, 203 F.3d at 1053 & 1055 n. 8 (involving habeas review of a pre-Hernandez Batson decision, declining to apply the Hernandez rule, and analyzing the state court's decision under step one of Batson instead).

"[i]n any event, I was not persuaded that [Burns] could give the death penalty, *particularly to a fellow black person.*" (Emphasis added). Weaver argues that this statement is racially discriminatory on its face, and requires a finding of a Batson violation. The Missouri Supreme Court held that this comment did not violate Batson because it was clear that the "prosecutor's decision to strike B[urns] was *not based solely upon race* or upon any assumptions about persons of [Burns's] race but was based upon the way she behaved and answered questions, that is, hesitation, lack of eye contact, flippancy and other intangibles observed only by those present in the courtroom." Weaver, 912 S.W.2d at 509 (emphasis added).

The Missouri Supreme Court's analysis is consistent with the dual motivation analysis that we have recognized. See United States v. Darden, 70 F.3d 1507, 1531 (8th Cir.1995). In Darden, we rejected a Batson claim where the prosecutor gave several race-neutral reasons for striking a venireperson before adding one reason that was discriminatory. The district court did not expressly find that the prosecutor's peremptory strike was based solely on the race-neutral reasons, but said "the other reasons you expressed give cause that are ··· racially neutral-the other reasons you stated. . . For that reason I'm allowing the strike··· [T]he other reasons you gave give the basis for being a strike." Id. (quoting the trial transcript). We held that the district court's decision "was equivalent to a finding that the prosecutor would have exercised the strike even without the one non-racially neutral motive." Id. (emphasis added).

Here, the Missouri Supreme Court found that the peremptory strike "was based" upon the several race-neutral reasons given by the prosecutor. Weaver, 912 S.W.2d at 509. That decision, as in Darden, is equivalent to a finding (and necessarily implies) that the prosecutor would have exercised the strike even if he hadn't expressed a facially discriminatory motive. Thus, we find no "unreasonable" error in the Missouri

Supreme Court's factual determination. See 28 U.S.C. § 2254(d)(2); cf. Williams, 120 S.Ct. at 1522, 120 S.Ct. 1495.

IV. The Remaining Claims

After determining that a Batson violation occurred, the district court failed to address the remaining twenty-one issues raised by Weaver in his petition. We have instructed district courts to decide *all* issues raised in a habeas petition, particularly in death penalty cases, on the grounds that "the allowance of piecemeal litigation cannot possibly serve the interests of society, the defendant or the crime victim." Hulsey v. Sargent, 15 F.3d 115, 119 (8th Cir.1994). On remand, the district court must address all of Weaver's remaining claims at the same time, regardless of their disposition.

CONCLUSION

For the reasons stated above, we reverse and remand for further proceedings consistent with this opinion.

MORRIS SHEPPARD ARNOLD, Circuit Judge, dissenting.

Because the prosecutor's open admission that he based his decision to strike Ms. Burns partly upon her race constitutes direct evidence of unconstitutional discrimination, the state trial court was, in my view, required to make an inquiry into whether the prosecutor would have made the same decision absent the illegal animus. The state trial court never made the necessary finding on this crucial factual matter, however, nor did the Missouri Supreme Court, because it applied the wrong legal standard. The Supreme Court of Missouri merely held that "the prosecutor's decision to strike [Ms. Burns] was not based *solely* on race or upon any assumptions about persons of [her] race," Weaver, 912 S W.2d at 509 (emphasis supplied). This holding begs the question because the relevant issue is not whether the

prosecutor based his strike solely on race, but whether he would have stricken Ms. Burns had race not been a motivation. See Darden, 70 F.3d at 1531-32. I believe that this legal error involved at the very least an unreasonable application of Batson.

I also think, moreover, that the district court erred in holding, essentially, that it would be unreasonable to find on the record before the state trial court that the prosecutor would have made the same decision absent the unconstitutional animus. For that reason, I would remand to the district court with directions to issue a writ of habeas corpus ordering Mr. Weaver's release unless within 120 days the state court makes a finding in accordance with the principles laid down in *Batson*. *See Coulter v. Gilmore*, 155 F.3d 912, 922 (7th Cir.1998). In other words, on remand, the state court would be obliged to decide whether the prosecutor would have stricken Ms. Burns but for her color. If he would not have, Mr. Weaver would be entitled to relief.

I therefore respectfully dissent.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

WILLIAM WEAVER,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 4:96-CV-2220 CAS
	)	
MICHAEL BOWERSOX,	)	
	)	
Respondent.	)	

MEMORANDUM AND ORDER

This matter is before the court on petitioner William Weaver's (Weaver) First Amended Petition for Writ of Habeas Corpus filed on June 27, 1997.

I. BACKGROUND

A. Facts.

Weaver, an African-American male, was convicted for the first degree murder of Charles Taylor.[1] State of Missouri v. Weaver, 912 S.W.2d 499, 507 (Mo. 1995). As set out by the Missouri Supreme Court, the facts are as follows. On July 6, 1987, Weaver and his co-defendant Daryl Shurn entered Taylor's apartment with the intent to kill him. Id. Taylor brandished a gun and successfully escaped from the apartment.

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[1]Daryl Shurn, Weaver's co-defendant, was also convicted for murdering Mr. Taylor. State v. Missouri v. Shurn, 866 S.W.2d 477 (Mo. 1993).

Id. Weaver and Shurn chased Taylor and fired several s hots at him. Taylor escaped into a wooded area, but fell due to wounds he had suffered. Id. Weaver and Shurn briefly left the woods to return to their automobile. Weaver went back into the wooded area in which Taylor had fallen and shot him again. Taylor subsequently died from multiple gunshot wounds to the head. Id. Weaver and Shurn fled the murder scene in their car. The incident was immediately reported to police by witnesses at the scene. Id. at 508. Police soon spotted the vehicle and began to chase it. Id. After crashing, Weaver and Shurn fled on foot. Id. Shurn was captured at the scene of the crash, but police had to chase Weaver into a nearby apartment complex. Weaver was eventually caught and placed under arrest. Police then returned him to the scene of the crash, where one of the original pursuing officers identified Weaver as the man who had fled. Id.

B. Procedural History

In 1988, petitioner Weaver was tried, convicted, and sentenced to death in the Circuit Court of St. Louis County, Missouri in the case styled State of Missouri v. William Weaver, Cause No. 565118B. Weaver appealed this conviction directly to the Missouri Supreme Court, Weaver, 912 S.W.2d 499 (Mo. 1995). Proceeding pro se, Weaver also filed a motion for post-conviction relief pursuant to Missouri Supreme Court Rule 29.15. He subsequently filed an amended Rule 29.15 motion. The court conducted an evidentiary hearing on the Rule 29.15 motion from September 13, through September 15, 1993. A subsequent hearing was held on July 28, 1994. On November 29, 1994, the Circuit Court of St. Louis County, Missouri denied relief on all grounds. Weaver then appealed the denial of his Rule 29.15 motion to the Missouri Supreme Court.

Weaver's appeal from the order denying his Rule 29.15

motion was consolidated with his direct appeal pursuant to Missouri Rule 29.15(1). The Missouri Supreme Court affirmed Weaver's conviction, sentence and the denial of post-conviction relief on January 23, 1996. Weaver, 912 S.W.2d at 523. Weaver filed a pro se Petition for Writ of Habeas Corpus on April 18, 1996. This court issued a May 3, 1996, Order stating it would dismiss without prejudice Weaver's Habeas Corpus if he filed for a Writ of Certiorari. On June 21, 1996, Weaver filed for a Writ of Certiorari and this Court dismissed his petition without prejudice on July 1, 1996. After the United States Supreme Court denied his Writ of Certiorari, Weaver filed a Petition for Writ of Habeas Corpus with this Court on November 12, 1996. Upon being appointed counsel, Weaver filed the First Amended Petition for Writ of Habeas Corpus which is now before the Court.

II. DISCUSSION

Weaver's petition for relief alleges that his trial and conviction in Missouri state court violated the guarantees of the United States Constitution on twenty-two (22) grounds. Respondent, the Superintendent of Potosi Correctional Center, asserts that Weaver's claims are either procedurally defaulted or have no merit. Although not filed as a separate motion, Weaver seeks an evidentiary hearing on his amended petition. In light of the following analysis, this request will be denied as moot.

A. Ground for Relief.

In support of his First Amended Petition for Writ of Habeas Corpus, Weaver asserts the following grounds for relief:

1. Batson Violation
2. Improper Guilt and Penalty Phase Closing Arguments by the Prosecutor

3. Prosecuting Attorney's Investigator Posing as a Juror
4. Brady Violation - Prosecutor's Failure to Completely Disclose Agreement with Witness
5. Brady Violation - Undisclosed Police Dispatch Tape
6. Brady Violation - Undisclosed Description of Suspect
7. Admission of Hearsay Evidence - Confrontation Clause Errors
8. Denial of Rule 29.15 Discovery
9. Autopsy Hearing
10. Ineffective Assistance of Counsel
11. Supplemental 29.15 Motion
12. Inadmissible Identifications
13. Unconstitutional Search
14. Grand Judy Race Discrimination
15. Unconstitutional Application of Death Penalty
16. Adopting State's Findings
17. Acquittal First
18. failure to Conduct Individual Voir Dire
19. Separate Penalty Phase Jury
20. Cautionary Instruction
21. Reasonable Doubt Instruction
22. Additional Procedural Information

B. Scope of Review.

The President signed into law the Antiterrorism and Effective Death Penalty Act of 1996 (the AEDPA) on April 24, 1996. Pub.L. No. 104-132, 110 Stat. 1214, 1218-21 (1996). The AEDPA revised 28 U.S.C. §2254 to limit the scope of review a federal court can apply to analysis of an application for habeas corpus relief:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

AEDPA at §104(3) (codified at 28 U.S.C. §2254(d)).

The parties disagree on whether the scope of review stated in the amended version of §2254 applies to this case. Respondent contends the AEDPA's "new, highly deferential standard for evaluating state court rulings," should apply in this case. Lindh v. Murphy, 117 S.CT. 2059, 2066 n.7 (1997). Petitioner Weaver disagrees. Weaver originally filed his Petition for Habeas Corpus relief in this Court on April 18, 1996. That petition was dismissed without prejudice for failure to exhaust state remedies on July 1, 1996. Weaver again filed a Petition for Writ of Habeas Corpus with this Court on June 27, 1997. The AEDPA requires that a petitioner apply to the Court of Appeals for authorization to file a second or successive application for a writ of habeas corpus in federal district court. 28 U.S.C. §2244(b)(3)(A). Weaver argues that since respondent has not claimed the instant petition before the Court is a second or successive application for relief, respondent has

conceded he has filed just one petition for a writ of habeas corpus. In short, Weaver contends the June 27, 1997 petition currently before the Court is simply a continuation of the initial petition he filed on April 18, 1996, and it is therefore not subject to the provisions of the AEDPA.

The Court need not determine whether the AEDPA applies to Weaver's petition, because the Court finds that the petition in this case should be granted even under the newer, more deferential standard of review provided under the AEDPA.

C. Analysis.

Weaver first argues that the prosecutor violated his rights under the Equal Protection Clause of the Fourteenth Amendment by impermissibly exercising peremptory challenges to exclude African-American venirepersons solely on the basis of their race in violation of Batson v. Kentucky, 476 U.S. 79 (1986). Weaver further argues that state court erred in finding that the prosecutor's proffered reasons for striking the venirepersons were not based on impermissible racial considerations. Respondent does not contend this claim has been procedurally defaulted and argues only that the lower court's decision was reasonable, is supported by the record, and is entitled to deference.

Under the AEDPA, a state court's determination that a prosecutor was not motivated by improper racial considerations in using his peremptory challenges will be upheld and the petitioner will not be entitled to habeas relief, unless the state court's determination amounted to an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(2). Review of the trial court's determination that no Batson violation occurred may also entail an application of th4e legal standard to the facts.

In other words, this may constitute a mixed question of law and fact under §2254(d)(1) rather than a purely factual determination under §2254(d)(2). However, the "unreasonable application" language of (d)(1) and the "unreasonable determination" language of (d)(2) establish essentially the same deferential standard. See Barker v. Ykins, et al., 993 F.Supp. 592, 604 n.11 (E.D. Mich. 1998).

In Batson, the Supreme Court stated, "Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges for any reason at all, . . . the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race[.]" 476 U.S. at 89 (citation and internal quotation omitted). Evaluation of a Batson claim involves a three part burden-shifting process:

> First, the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race. Second, if the requisite showing has been made, the burden shifts to the prosecutor to articulate a race-neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the defendant has carried his burden of proving purposeful discrimination.

Hernandez v. New York, 500 U.S. 352, 358-59 (1991).

The state trial court held a Batson hearing to investigate Weaver's claims that the prosecutor's peremptory strikes against venirepersons Burns and Newsome were improperly motivated by racial considerations. Weaver objected during voir dire that the striking of these two African-American venirepersons demonstrated a "policy and practice of the prosecuting attorney's office to virtually eliminate blacks from the jury." Trial Tr., p. 531. Weaver also argued at trial that,

"The jury, we believe, is not representative of the population in St. Louis County. . . ." id. In response, the prosecutor explained the use of his peremptory challenges as follows:

> [T]here's not a pattern of discrimination or systematic exclusion. There are three blacks on the jury, which is 25% of the jury, which I think is higher than the black population in St. Louis County.
>
> The two blacks I struck with my peremptory strikes were not because the people were black but for other reasons. Let's see, Juror number 27, Ms. Burns, I struck for a number of reasons: One, in the death penalty phase, although she said she could impose the death penalty, I wasn't persuaded that she could. I thought she said it with some reluctance and some hesitation. I also couldn't maintain eye contact with her. I know bad vibrations and bad chemistry between a lawyer and prospective juror doesn't carry great weight with the Court or, at least, the Court of Appeals, but I think it's a legitimate reason for the attorney to strike someone.
>
> In any event, I was not persuaded that she could give the death penalty, particularly to another black person. I didn't think she was strong enough. I observed her a lot of times cutting up and talking to the black gentleman next to her, Mr. Innman, who I have left on the jury by way of my strikes. And I simply felt that she would not be a fair and impartial juror.
>
> With regard to juror number 54, Ms.

> Newsome, I felt that she was a weak person, both during the voir dire on the death penalty . . . just the general voir dire, although Ms. Black conducted most of it. My impression of her was that she was not particularly bright and I struck a couple of white people for that very same reason. I thought in a case like this I needed intelligent people. I didn't figure she qualified in that regard and I thought she took the whole matter rather frivolously. But in any matter, Judge, of nine peremptory strikes, I have used only two to strike blacks. Seven were used to strike whites. I have left three blacks on the jury, even though I have enough peremptory strikes to attempt to remove all five.
>
> . . . .
>
> Perhaps I misstated my case somewhat with Ms. Newsome when I say intellectually weak. What I really meant is her personality struck me - - granted, she did try hard to get on the jury, which showed a civic minded interest; but in those interviews with the Court, she just struck me as a person that was a weak personality where the death penalty is involved, and I didn't think she would be able to vote for the death penalty.

Trial Tr., p. 532-33, 537.

In evaluating Weaver's claim of a Batson violation the trial court observed that three of the jurors left on the jury panel for selection of the first twelve jurors were African-American. Trial Tr., p. 533. The trial court also not4ed that an African-American was left on the venire panel for selection as the

alternate. id. The trial court proceeded to conduct a statistical analysis of the possible makeup of the jury stating, "With four out of 14, if the defendant were to leave all four of those, . . . that would constitute, I estimate, 30 percent of the entire panel." id. Based on this analysis, the trial court held no Batson violation was committed. id. at 533, 538.

If a prosecutor presented an explanation for his use of peremptory challenges with respect to specific venirepersons, and the trial court issued a ruling on the ultimate issue of intentional discrimination, the "issue of whether the defendant had made a prima facie showing becomes moot." Hernandez, 500 U.S. at 358. In the instant case, just as in Hernandez, the prosecutor defended his use of peremptory challenges without any prompting from the trial court. Thus, under the three stage burden shifting analysis, the issue of whether Weaver made a prima facie showing of a Batson violation is moot, and the Court turns its attention to the prosecutor's explanation of his peremptory strikes against Newsome and Burns, and must determine if Weaver has met his burden of proving purposeful discrimination.

Weaver offers statistical evidence as support for his argument that the prosecutor engaged in a systematic practice of striking African-Americans from juries. He states that out of four murder cases tried between 1979 and 1987 where the African-American defendant received a sentence of death, not a single African-American juror was on the panels. Pet.'s Traverse, App. 1. Weaver further contends that during the same period of time very few African-Americans were allowed to sit on panels which sentenced an African-American defendant to life imprisonment without the possibility of parole. id. at App. 2. The Court concludes this statical evidence is insufficient to support a finding that the trial court made an "unreasonable determination" as required to grant Weaver's petition for habeas relief.

Weaver cites Cochran v. Herring for the proposition that statistics alone are sufficient to prove intentional discrimination during voir dire. 43 F.3d 1404, 1410 (11th Cir. 1995). In Cochran, however, the petition presented statistical evidence as well as testimony from prosecutors and former prosecutors with the district attorney's office stating the general philosophy of the office was that African-American jurors should be prevented from serving as jurors whenever possible. Id. Weaver argues that in Ford v. Norris, the Eight Circuit declared statistical data was sufficient to prove the prosecutor excluded African -Americans over a period of time for a Swain violation.[2] 67 F.3d 162, 166 (8th Cir. 1995). Like Cochran, however, the petitioner in Ford also presented testimony from local attorneys who stated that a particular prosecutor consistently used peremptory challenges to strike as many African-Americans from juries as possible. Id.

The statistical information provided by Weaver is to be accompanied by any testimony from local attorneys, let alone prosecutors or former prosecutors and is too scant to support a finding that the prosecutor was motivated by improper racial considerations. Compare Miller v. A.L. Lockhart, 65 F.3d 676 (8th Cir. 1995) (relying on very detailed analysis provided by statistician Dr. Berry). Giving the trial court the deference it is due under the AEDPA, the Court determines Weaver's statistical evidence is an insufficient basis on which to conclude the trial court unreasonably determined no Batson violation occurred as to venirepersons Newsome and Burns.

With respect to venireperson Newsome, Weaver argues that the reasons offered by the prosecutor for striking her are

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[2]Swain v. Alabama, 380 U.S. 202 (1965), was the controlling case for proving racial discrimination prior to Batson.

pretextual. The prosecutor struck her based on his feeling that she was "weak. . . on the death penalty." Trial Tr., p. 532. The prosecutor also stated he struck venireperson Newsome because she was "not particularly bright," the same reason he struck some Caucasian people from the jury panel. id. at 532-33. After the prosecutor offered an explanation of his peremptory strikes to the trial court judge, Weaver's trial attorney developed the record further in an attempt to show that the prosecutor's proffered reasons were a pretext for discrimination. Trial Tr. p. 534. Pretext can be provided by presenting evidence that non-minority panel members who share the same characteristics as the stricken minority venireperson remained on the panel. United States v. Jenkins, 52 F.3d 743, 747 (8th Cir. 1995). Weaver's trial attorney specifically stated "[Newsome] was not asked anything specifically which would indicate what her intelligence was one way or another." Trial Tr., p. 534. Weaver's trial attorney also argued that the prosecutor assumed she was not intelligent without any basis for doing so and stated Newsome gave responses similar to those of Caucasian jurors who were not stricken from the jury. id. The trial court then had to determine if the prosecutor's articulated reasons were race neutral and whether Weaver met his burden of proving purposeful discrimination. Hernandez, 500 U.S. at 359.

A challenge of peremptory strikes based on subjective assessments such as a venireperson's demeanor must be carefully scrutinized. Jenkins, 52 F.3d at 746; United States v. Sherrills, 929 F.2d 393, 395 (8th Cir. 1991). The trial court should evaluate the credibility of each reason offered by the prosecutor. United States v. Scott, 26 F.3d 1458, 1466 (8th Cir. 1994). Upon review of the record, it appears the trial court did not issue an explicit ruling as to whether the reasons offered by the prosecutor were pretextual, but instead focused on the number of African-Americans left on the panel and relied solely on its own numbers analysis to determine that no prima facie

showing of discrimination had been made. Trial Tr., p. 533, 538.

In Jenkins, the petitioners claimed on appeal that the trial court "failed to consider the veracity of the government's asserted explanations" for its use of peremptory strikes against minority members of the jury panel. 52 F.3d at 746. At trial, the prosecutors pointed to specific behavior by two jurors, such as scowling, that they interpreted as disinterest and therefore struck from the panel. Id. The trial court then proceeded to inquire as to whether the prosecutor struck any non-minority venirepersons for disinterest, considered the statements made by the prosecutor, and assessed the credibility of those statements. Id. Based on the fact that the trial court assessed the truthfulness of the reasons offered by the prosecutor in Jenkins, the Eighth Circuit held the trial court "implicitly found . . . the government's use of the peremptory challenges was not motivated by race." Id.

As in Jenkins, the prosecutor in the instant case also described specific behavior and responses by venireperson Newsome which lead to his decision to strike her from the panel. Trial Tr., p. 532-33. The record in this case, however, is devoid of any evidence that the trial court actually considered the genuineness of the prosecutor's proffered reasons for striking Newsome, much less that the trial court made a determination as to whether those reasons were pretextual. The trial court found that no Batson violation existed without even considering whether the prosecutor's stated reasons for striking venireperson Newsome from the jury were a pretext for discrimination, and relied solely on its own numbers analysis in reaching that conclusion.

Although a trial court is not required to make express findings on each required element of a Batson claim. United States v. Perez, 35 F.3d 632, 636 (1st Cir. 1994), there must be

some indicia that the spirit of Batson was complied with and that findings sufficient to cover each of the three elements were made. Jenkins, 52 F.3d at 747. It is well established that the striking of even one venireperson for racially motivated reasons violates the Equal Protection Clause and is a Batson violation. United States v. Rodriguez, 859 F.2d 1321, 1324 (8th Cir. 1998) (citing United States v. Battle, 836 F.2d 1084, 1086 (8th Cir. 1987)). By relying solely on a numbers analysis and not analyzing whether Newsome was struck for improper racial reasons, the trial court clearly reached a decision which resulted from the unreasonable application of law as announced in Batson. 28 U.S.C. §2254(d)(1). A new trial is therefore warranted. Shurn v. Delo, 177 F.3d 662, 665 (8th Cir. 1999).

The Court now turns its attention to the prosecutor's strike of venireperson Burns from the panel. Weaver argues that Burns was struck from the jury solely because she was African-American, as is Weaver. Weaver points out that the prosecutor stated to the trial court, "In any event, I was not persuaded that she would give the death penalty, particularly to a fellow black person." Trial Tr., p. 532. "Whether a race-neutral explanation is a pretext for discrimination is a question of fact." Gee v. Groose, et al., 110 F.3d 1346, 1351 (8th Cir. 1997). In the normal course of review, this Court would only overrule a trial court's factual finding that the reasons offered by the prosecutor were race neutral if it was an unreasonable determination. 28 U.S.C. §2254(d)(2). Just as with Newsome, however, the trial court ran afoul of Batson unreasonably applying the law in failing to analyze whether the prosecutor's proffered reasons for striking Burns were race neutral and a new trial is required. Tr. T. p., 533, 538, 28 U.S.C. §2254(d)(1).

In the event it can be ascertained that the trial court actually considered the prosecutor's reasons for striking Burns and determined they were race neutral, the Court goes on to address Weaver's claim that such a factual determination was

unreasonable. 28 U.S.C. §2254(d)(2). Weaver argues "the prosecutor believed black venirepersons would be impartial to black defendants and, therefore, fails to vote for the death penalty." Pet.'s Trav., p. 16. This is clear from the fact that the prosecutor followed his opinion that Burns was not strong enough to sentence another African American to death by stating, "I simply felt she would not be a fair and impartial juror." Trial Tr., p. 532. The prosecutor also stated he struck Burns because he had bad chemistry with her, did not feel she was strong enough, and she was joking with a fellow venireperson too much. id. at 532-33. Although these reasons are race neutral, they are ancillary at best. The main thrust of the prosecutor's stated reason for striking Burns was that he felt she could not sentence a fellow African American to death. id. "[A] prosecutor's 'assumption that a black juror may be presumed to be partial simply because is black' . . . violates the Equal Protection Clause." Holland v. Illinois, 493 U.S. 474, 484 n.2 (1990). The Court is aware that the AEDPA has "heightened [the] evidentiary burden on a habeas petitioner's challenge to a state court's factual findings." Pruett v. Norris, 153 F.3d 579, 584 (8th Cir. 1998). Even under this heightened standard, however, the Court finds the prosecutor struck venireperson Burns for reasons which were clearly not race neutral and that Weaver has met his overall burden of proving discrimination. Thus, a Batson violation occurred with respect to Burns and a new trial is required.

III. CONCLUSION

The Court finds the trial court failed to apply the correct legal standard in setting Weaver's claims that venirepersons Newsome and Burns were struck from the jury for improper reasons. Instead of analyzing the veracity of the prosecutor's proffered reasons for striking Newsome and Burns, the trial court simply found no Batson violation occurred based on the number of minorities remaining of the venire panel. This in

and of itself requires a new trial. Furthermore, with respect to Burns, it is clear that the reasons articulated by the prosecutor for striking her were not race neutral in direct violation of Batson. The Court need not address Weaver's other constitutional claims, because claims warrant habeas relief and a new trial.

Because the Court has already determined Weaver is entitled to a Writ of Habeas Corpus, the Court will deny his request for an evidentiary hearing as moot. The Court will vacate the judgment and sentence in State of Missouri v. William Weaver, Cause No. 565118B, and will enter a Writ of Habeas Corpus. If respondent elects to retry Weaver, a notice of its intention to do so must be filed prior to September 27, 1999.

Accordingly,

IT IS HEREBY ORDERED that petitioner William Weaver's First Amended Petition for Writ of Habeas Corpus is GRANTED. [Doc. 15]

IT IS FURTHER ORDERED that William Weaver's request for an evidentiary hearing is DENIED as moot.

IT IS FURTHER ORDERED that the Judgment and Sentence in State of Missouri v. Weaver, Cause No. 565118B is VACATED. If the State of Missouri elects to retry William Weaver, it must file a notice of its intention to do so prior to September 27, 1999.

A Writ of Habeas Corpus shall accompany this Memorandum and Order.

Charles A. Shaw
United States District Judge

Dated this 9th day of August, 1990.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-2880/2938

William Weaver,	*
	*
Appellee/Cross-Appellant,	*
	*Order Denying Petition
v.	*Rehearing and for Re-
	*hearing En Banc
Michael Bowersox,	*
	*
Appellant/Cross-Appellee.	*

The petitions for rehearing en banc are denied. The petitions for rehearing by the panel are also denied.

Chief Judge Loken, Judge Wollman, Judge Riley, Judge Coloton, and Judge Gruender would grant Michael Bowersox's petition for rehearing en banc.

Judge Benton did not participate in the consideration or decision of this matter.

May 31, 2006

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court of Missouri
en banc

STATE OF MISSOURI, Respondent,	)
v.	) No. 71051
WILLIAM WEAVER, Appellant.	)

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY

The Honorable Alphonso H. Voorhees, Judge
The Honorable Herbert Lasky, Judge

William Weaver was convicted of the first degree murder of Charles Taylor and sentenced to death.[3] A post-conviction motion was filed pursuant to Rule 29.15. Relief was denied after an evidentiary hearing. Appeals from both judgments were consolidated. This Court has jurisdiction. *Mo. Const. art. V, § 3.* The conviction, sentence and denial of relief pursuant to Rule 29.15 are affirmed.

Prior to July 1987, Charles Taylor and members of Daryl Shurn's family had been involved in the ownership and operation of drug houses. A federal drug prosecution had been commenced against Daryl Shurn's brothers, Charles and Larry Shurn, in which Taylor was to be a key witness. Taylor had worked for the Shurns and held some of the Shurns' drug houses in his name.

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[3]Daryl Shurn was also convicted of murdering Taylor. *State v. Shurn*, 866 S.W.2d 447 (Mo. banc 1993), *cert. denied*, 513 U.S. 837, 115 S.Ct. 118, 130 L.Ed.2d 64 (1994).

On the morning of July 6, 1987, William Weaver and Daryl Shurn arrived at Taylor's home in the Mansion Hills apartment complex. Their plan was to force Taylor to sign over the Shurns' drug properties which Taylor was retaining in his name against the Shurns' will. After Taylor had signed the paperwork, Weaver was supposed to kill Taylor. The plan was not completely successful.

After Weaver and Shurn entered Taylor's apartment, Taylor unexpectedly pulled a gun and escaped. Weaver and Shurn gave chase and fired several shots at Taylor. Numerous residents saw Weaver and Shurn running after Taylor, shooting at him. Weaver and Shurn followed Taylor to a wooded area where Taylor fell from his wounds. Weaver and Shurn went back to the automobile. Then Weaver returned to the wooded area where Taylor had fallen and shot Taylor again. Taylor died from several gunshot wounds to the head.

Weaver and Shurn drove away from the murder scene at a high rate of speed. Witnesses at the scene immediately reported the incident to police, giving a detailed description of the vehicle. Shortly thereafter, police spotted the Shurn vehicle and gave chase. Following a collision during rush hour traffic on Interstate 70, Weaver and Shurn fled on foot. Shurn was captured at the scene, but Weaver ran off toward the Hillcrest apartment complex adjacent to the highway. Not far away, another police officer located Weaver running shoeless on a concrete street, sweating profusely. On approach by the officer, Weaver claimed he was jogging, although he was many miles from his home. He claimed to be lost. Weaver was placed under arrest and returned to the scene of the accident where one of the original pursuing police officers positively identified Weaver as the man who ran away from the Shurn car after the crash.

While awaiting trial, Weaver was incarcerated with a man by the name of Robert Dutch Tabler. Tabler testified that

Weaver told him he was a hit man on the streets, that defendant and Shurn had killed Charles Taylor, and that defendant's testimony at trial would be that he was merely out jogging when the police stopped him. Weaver's primary defense at trial was misidentification by police.

On this evidence the jury convicted Weaver of first degree murder in the shooting death of Charles Taylor. He was sentenced to death. A post-conviction relief motion was filed and denied.

I.

In his first point, defendant claims the prosecutor exercised two peremptory strikes against venirepersons B and N, in violation of the prohibition in *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986). At the *Batson* hearing, Weaver objected to the state's two strikes because the "striking of the two blacks evidenced a policy and practice of the prosecuting attorney's office to virtually eliminate blacks from the jury." The prosecutor's response was as follows:

> [T]here's not a pattern of discrimination or systematic exclusion. There are three blacks on the jury, which is 25% of the jury, which I think is significantly higher than the black population in St. Louis County.
>
> The two blacks I struck with my peremptory strikes were not because the people were black but for other reasons. Let's see. Juror number 27, Ms. [B], I struck for a number of reasons: One, in the death penalty phase, although she said she could impose the death penalty, I wasn't persuaded that she could. I

thought she said it with some reluctance and some hesitation. I also couldn't maintain any eye contact with her. I know bad vibrations and bad chemistry between a lawyer and a prospective juror doesn't carry great weight with the Court or, at least, the Court of Appeals, but I think it's a legitimate reason for the attorney to strike someone.

In any event, I was not persuaded that she could give the death penalty, particularly to a fellow black person. I didn't think she was strong enough. I observed her a lot of times cutting up and talking to the black gentleman next to her, Mr. [I], who I have left on the jury by way of my strikes and I simply felt that she would not be a fair and impartial juror.

With regard to juror number 54, Ms. [N], I felt that she was a weak person, both during the voir dire on the death penalty and on the voir dire on the death penalty, and on the voir dire-just the general voir dire, although Ms. Black conducted most of it. My impression of her was that she was not particularly bright and I struck a couple of white people for that very same reason. I thought in a case like this I needed intelligent people. I didn't figure she qualified in that regard and I thought she took the whole matter rather frivolously.

....

Perhaps I misstated my case somewhat with Ms. [N] when I say intellectually weak. What I really meant is her personality struck

> me-granted, she did try hard to get on the jury, which showed a civic minded interest; but in those interviews with the Court, she just struck me as a person that was a weak personality where the death penalty is involved, and I didn't think she would be able to vote for the death penalty.

The trial court found the prosecutor's explanations to be race-neutral.

It is error to use a peremptory strike to challenge jurors solely on the basis of race or on the assumption that members of a particular racial group are unable to impartially consider the state's case against a member of the juror's racial group. *Batson*, 476 U.S. at 89, 106 S.Ct. at 1719. Where a prosecutor gives a reasonably specific, race-neutral reason for making peremptory strikes, the prosecutor's explanation will suffice unless there is an inherently discriminatory intent in that explanation. *Hernandez v. New York*, 500 U.S. 352, 358-59, 111 S.Ct. 1859, 1865-66, 114 L.Ed.2d 395 (1991). A legitimate reason is not one that makes sense but one that does not deny equal protection. *Purkett v. Elem*, ____ U.S. ____, 115 S.Ct. 1769, 1771 (1995). A reviewing court will set aside the trial court's finding as to whether the prosecutor discriminated in the exercise of peremptory challenges only if such finding is clearly erroneous. *State v. Blankenship*, 830 S.W.2d 1, 15 (Mo. banc 1992).

The trial judge is obligated to apply a three-pronged analysis in assessing the explanations provided by the prosecutor. *State v. Antwine*, 743 S.W.2d 51, 64-65 (Mo. banc 1987), *cert. denied* 486 U.S. 1017, 108 S.Ct. 1755, 100 L.Ed.2d 217 (1988). Trial judges must evaluate the susceptibility of the particular case to racial discrimination, the prosecutor's demeanor and, finally, the judge must evaluate the explanation

itself. *Id.* at 65. Crucial to the analysis is whether similarly situated white venirepersons escaped the state's challenge. *Id.*

A.

Weaver asserts that striking B because she could not give the death penalty to a fellow black violates *Batson* and is racially discriminatory on its face. The prosecutor's stated reasons for striking B were based upon her words and his observations of her conduct in the prosecutor's presence during voir dire in which the prosecutor perceived bias by juror B indicating her inability or unwillingness to impose the death penalty. What a prosecutor observes about a potential juror in voir dire, as well as what is said, may form a legitimate nondiscriminatory basis for exercising a peremptory strike. *See Purkett*, 115 S.Ct. at 1771. Those observations here included reluctance and hesitation in answering questions, lack of eye contact with the prosecutor, lack of strength, and "cutting up" and talking during voir dire. The prosecutor's explanation here was specific, race-neutral, and free of any racially discriminatory purpose. The trial court had the opportunity to observe the juror in question, listen to the manner in which she answered the questions, and to assess the prosecutor's demeanor and reasons for striking the juror.

Weaver cites a series of cases in which a prosecutor's racial stereotyping or assumptions made by the prosecutor about members of a minority group were held to be inadequate reasons for using a peremptory strike to dismiss a juror. *See Rush v. Smith*, 56 F.3d 918 (8th cir. en banc 1995); *Moore v. State*, 811 S.W.2d 197, 200 (Tex.App.1991); *Somerville v. State*, 792 S.W.2d 265, 268-69 (Tex.App.1990); *State v. Tomlin*, 299 S.C. 294, 384 S.E.2d 707, 710 (1989); and *State v. Holman*, 759 S.W.2d 902 (Mo.App.1988). The distinction between this case and all of those relied on by the defendant is that in this case, the prosecutor's decision to strike B was not

based solely on race or upon any assumptions about persons of B's race but was based upon the way she behaved and answered questions, that is, hesitation, lack of eye contact, flippancy and other intangibles observed only by those present in the courtroom. Specifically, in *Holman* the juror in question was struck because "she is a woman and because she is black." *Holman*, 759 S.W.2d at 903. In *Holman*, neither of the reasons given were based upon conduct or answers in the courtroom but, rather, on assumptions made about race and gender. Thus, *Holman* does not require us to find a *Batson* violation in this case.

B.

As to N, the state's reason for striking her was race-neutral. By her words and conduct, N led the prosecutor to believe that she was frivolous, had a weak personality or was intellectually weak, particularly where the death penalty was concerned. It is not inherently pretextual to say that in a capital case a prosecutor would want serious jurors that are of above average intelligence and not reluctant to impose the death penalty when appropriate.

In determining if purposeful discrimination has occurred, the trial court should take into account a variety of factors, but the chief consideration should be the plausibility of the prosecutor's explanations in light of the totality of the facts and circumstances surrounding the case. *State v. Parker*, 836 S.W.2d 930, 939 (Mo. banc 1992), *cert. denied* 506 U.S. 1014, 113 S.Ct. 636, 121 L.Ed.2d 566 (1992). It is not unusual for prosecutors to use their observations, past experience and common sense in exercising peremptory challenges, so long as the factors they rely on are race-neutral. *Id.; Blankenship*, 830 S.W.2d at 15-16.

There is another factor that weighs against the

contention that the prosecutor had a policy and practice to eliminate blacks from the jury, as was indicated in the defendant's objection. While this Court stops short of engaging in a "numbers analysis" to determine Weaver's *Batson* claim, the overall composition of the jury in this case belies the objection made at trial that the prosecutor's strikes against the two black jurors were racially motivated. *See Parker*, 836 S.W.2d at 940. Three of those who actually served on the jury and returned the verdict were African-Americans.

The first point is overruled.

II.

In his second point, Weaver claims the trial court erred in admitting hearsay evidence. During cross-examination of police officer Cantwell, defense counsel elicited that the police found a briefcase belonging to Taylor near his body and that it contained a cocked and loaded .32 caliber handgun. It appears the defense was attempting to use the handgun evidence to create an inference that the victim was a violent person involved in the drug trade.

In response to this evidence, the prosecutor called Taylor's wife and another police officer, who collectively testified that Taylor had told them that he was carrying a gun because the word on the street was that Daryl Shurn intended to kill Taylor and that Shurn gave Taylor the "thumbs down" gesture when they saw one another in the city courts building.

In order for evidence to be admissible, it must be relevant, logically tending to prove a fact in issue or corroborate relevant evidence that bears on the principal issue. *State v. Mercer*, 618 S.W.2d 1, 9 (Mo. banc 1981), *cert. denied* 454 U.S. 933, 102 S.Ct. 432, 70 L.Ed.2d 240 (1981). Weaver argues that because he was not attempting to prove self-defense, and

because the briefcase and its contents were not relevant to the defense that he had been misidentified while jogging, evidence of Taylor's motivation for carrying the loaded handgun should not have been admitted. While Weaver is correct that the primary thrust of the defense was misidentification, the defendant injected the issue that the victim was carrying a loaded weapon. That tactic was designed to permit the jury to infer that the victim was violent and posed a threat to defendant. Thus, it was defense counsel's tactic to inject into the case the victim's state of mind.

Under the doctrine of curative admissibility, "where the defendant has injected an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects." *State v. Lingar*, 726 S.W.2d 728, 734-35 (Mo. banc 1987), *cert. denied* 484 U.S. 872, 108 S.Ct. 206, 98 L.Ed.2d 157 (1987). Under this doctrine, the defendant must first have introduced evidence, even though it might be technically inadmissible evidence. *See State v. Shurn*, 866 S.W.2d 447, 458 (Mo. banc 1993), *cert. denied* 513 U.S. 837, 115 S.Ct. 118, 130 L.Ed.2d 64 (1994). The victim's statement of fear of the defendant as a reason for carrying the gun was relevant and not unduly prejudicial under the state of mind exception to the hearsay rule. *Id.*; *State v. Boliek*, 706 S.W.2d 847, 850 (Mo. banc 1986), *cert. denied* 479 U.S. 903, 107 S.Ct. 302, 93 L.Ed.2d 276 (1986).

In his amended Rule 29.15 motion, defendant alleged that his trial counsel was constitutionally ineffective in not calling Larry Shurn's attorney as a witness to contradict the alleged confrontation at the civil courts building between Larry Shurn and Charles Taylor, in which Larry Shurn gave Taylor the "thumbs down" gesture. The attorney testified at the Rule 29.15 hearing that his memories were "very sketchy" of what occurred. In response to the question as to whether he saw Larry

Shurn give the signal, the attorney answered "no" but went on to respond, "I can't say that it didn't happen." The motion court found that this impeaching witness's testimony would not have changed the outcome of the murder trial. In order to establish the constitutionally ineffective assistance of counsel, defendant must show counsel's performance was so deficient as to undermine confidence in the outcome. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Here, the witness's testimony does not prove that the gesture was not made. Counsel's failure to call such witness does not undermine confidence in the outcome. The second point is denied.

III.

In his third point, Weaver complains that the trial court erred in failing to grant either a hearing before the verdict or a new trial after it was disclosed that the state's investigator, Lawrence Freeman, posed as a juror, wore a juror button, and mingled with the venire panel during the first day of jury selection either while the members of the venire panel were in the hallway outside the courtroom or in a jury assembly area on a separate floor.

During the early stages of the trial, Freeman became alarmed by a group of persons he believed to be members of the Weaver family who were standing near the courtroom where jury selection was taking place. According to Freeman, both men and women were carrying Gucci bags or purses capable of concealing weapons. Freeman responded by obtaining a juror badge from one of the court's staff in order to "provide security." While wearing the juror badge, Freeman was watching the persons near the courtroom door when he was approached by Mr. Smith, one of those who was ultimately selected to serve as a juror. The two were previously acquainted. Smith spoke to Freeman but was told by Freeman

that he could not talk because Freeman had been called to jury duty. Freeman claimed to have gotten word to the prosecutor about the bags, who informed the judge. When the judge announced that all persons entering the courtroom would be searched, the persons with the bags left.

Defense counsel observed Smith and Freeman talking, knew Freeman was an investigator for the prosecutor, and also knew that Smith was a juror. However, she did not bring her information to the attention of the trial judge prior to the trial by moving to strike Smith for cause and did not use a peremptory strike to remove Smith from the jury. Defense counsel first brought the matter to the attention of the trial judge during the instructions conference. The trial judge was concerned that an interrogation of the jurors at that time about what had occurred before the trial might be disruptive and so did not take immediate action. After the jury had completed its deliberations, the trial judge inquired before the jurors were discharged if any of them had contact with Freeman during the trial or whether Freeman had attempted to make any effort to discuss with any of them anything regarding the case. Juror Smith replied, "I know him. I spoke to him before the trial." There is nothing in the record to indicate that Freeman spoke with Smith about the subject matter of the trial.

Without a doubt, the court employee who gave the juror button to Freeman should be reprimanded, and Freeman's conduct was thoughtless, if not bizarre. He also should be admonished by his employer. Trial judges, lawyers, and those who are assigned to provide security and look after the needs of jurors while they are being selected, hearing evidence or deliberating must constantly guard against any outside influence or distraction.

Nevertheless, Freeman's actions do not rise to the level of *State v. Post*, 804 S.W.2d 862 (Mo.App.1991), where a

deputy sheriff and a police officer not assigned to the case mingled with jurors at their hotel rooms, and one deputy and a juror engaged in sexual improprieties such that the jury had been so distracted that it could not give "due and fair consideration of the facts." *Id.* at 862-63.

Where misconduct involving jurors during the progress of the trial is alleged, the verdict will be set aside unless the state affirmatively shows that the jurors were not subject to improper influences. *State v. Edmondson*, 461 S.W.2d 713, 723 (Mo.1971). In this case, where the facts are fully disclosed and they conclusively demonstrate an absence of prejudice to the defendant and an absence of any improper influence on the juror in question there is no prejudice. Under these circumstances, Weaver is not entitled to a new trial.

IV.

Defendant argues that the state's closing arguments during both the guilt and penalty phases of the trial were erroneous and further that counsel was ineffective in failing to object to some of the improper arguments. A review of the record discloses that defense counsel objected vehemently to almost all the arguments complained of here and that several of the objections were sustained, followed by curative instructions to the jury. The trial court has considerable discretion in allowing argument of counsel, and the rulings are reversible only for abuse of discretion where argument is plainly unwarranted. *State v. Armbruster*, 641 S.W.2d 763, 766 (Mo.1982). Our review of the arguments discloses neither error in permitting the arguments nor ineffective assistance of counsel in failing to object.

A.

First, Weaver alleges that the prosecutor improperly

emphasized his position as elected prosecutor in his choice of seeking the death penalty. The specific arguments were as follows:

(1) In the guilt phase, the prosecutor said, "If you don't believe the state's case here, you twelve people would never convict anybody." Defense counsel objected, and the court instructed the jury to disregard the comment.

(2) In the penalty phase closing, the prosecutor said, "Well, if this isn't [the proper case for the death penalty], what would it be? If this isn't a case where you can impose a death penalty, where people go out to Mr. Taylor's house to kill him because he's a witness, then what case would you ever return it in? ··· If this isn't a case that calls for the death penalty, I can't imagine one that would." The court overruled defense counsel's objection to this argument.

(3) Continuing his penalty phase closing argument, the prosecutor said, "I mean, if this isn't the case for the death penalty, then there's no case you'll do it ··· and, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty···· I'm the prosecuting attorney in this county, the top law enforcement officer in the county. I decide in which cases we ask for the death penalty and in which cases we don't." The trial court sustained the defendant's objection to the last statement and instructed the jury to disregard it.

(4) Finally, the prosecutor said, "If these facts don't justify, don't cry out for the death penalty, then which facts do?" To that statement, the trial court overruled the objection.

A prosecutor's argument may make reasonable inferences from the evidence. *Shurn*, 866 S.W.2d at 460; *State v. McDonald*, 661 S.W.2d 497, 506 (Mo. banc 1983), *cert. denied* 471 U.S. 1009, 105 S.Ct. 1875, 85 L.Ed.2d 168 (1985).

The inferences need not necessarily seem warranted. *Grubbs v. State*, 760 S.W.2d 115, 119 (Mo. banc 1988), *cert. denied* 490 U.S. 1085, 109 S.Ct. 2111, 104 L.Ed.2d 672 (1989). Statements by a prosecuting attorney in argument indicating his or her opinion that the accused is guilty, where it is apparent that such opinion is based on the evidence in the case, is permissible. *State v. Moore*, 428 S.W.2d 563, 565 (Mo.1968); *State v. Paglino*, 319 S.W.2d 613, 625 (Mo.1958). In this case, the prosecutor's rhetorical questions may seem flamboyant, if not somewhat abrasive, to a juror's ears. However, given the eyewitness testimony of how the murder was carried out and the cold execution manner in which the victim was killed, it is fair for the prosecutor to point out the strength of the state's case. The use of the rhetorical questions was, for the most part, a fair comment on the strength of the case.

As for his statements regarding his position as prosecuting attorney of the county, the court properly sustained the objections and directed the jury to disregard the argument. Trial courts have a superior vantage point from which to assess the pervasive effect of an improper argument. Thus, whether it can be dissipated by timely and appropriate action short of declaring a mistrial is a matter within the sound discretion of the trial court. *State v. Carter*, 641 S.W.2d 54, 60 (Mo. banc 1982), *cert. denied* 461 U.S. 932, 103 S.Ct. 2096, 77 L.Ed.2d 305 (1983).

This case is distinguishable from cases relied on by the defendant, including *State v. Evans*, 820 S.W.2d 545 (Mo.App.1991). There the prosecutor said, "If [the defendant] were innocent, I wouldn't bring a charge." *Id.* at 547. Merely stating that the prosecutor determines which penalty to ask for in capital cases is not the same as saying that if the defendant were innocent, he would not be charged. The objection, followed by the curative instruction, is adequate here.

In addition, this case is distinguishable from *Newlon v. Armontrout*, 885 F.2d 1328 (8th Cir.1989). There the court found that because the prosecutor expressed his personal belief in the propriety of the death penalty, emphasized his position of authority in the county as prosecutor, attempted to associate the defendant with several well-known mass murderers, appealed to the jurors' personal fears and emotions, and asked the jurors to "kill" the defendant, under the totality of the circumstances rendered the penalty phase of the trial fundamentally unfair. 885 F.2d at 1336-37. The arguments here do not rise to the level of the egregious conduct that is reported in Newlon. Neither is this case comparable with *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), where this Court reversed the punishment in a capital case because the prosecutor, among other excesses, had compared the brutality of the murder as being worse than all other murders in the county. Here there was no abuse of discretion in the trial court's ruling on defense counsel's objections.

B.

In his closing remarks, the prosecutor called the defendant's misidentification defense a "cock and bull story" and a "smokescreen," referred to the defendant as a liar, said defense counsel was "bold" and called into question the credibility and motives of several defense witnesses. Weaver characterizes the state's closing arguments as portraying defense counsel as having suborned perjury. Comments to the effect that a defendant or a defense witness were lying have repeatedly been upheld. A prosecuting attorney may comment on the evidence and the credibility of witness and, in the process, may belittle and point to the improbability and untruthfulness of specific testimony. *State v. Johnson*, 496 S.W.2d 852, 859 (Mo.1973). Here the comments on the testimony of the witnesses were well within the range of the prosecutor's adversarial responsibilities in making closing argument.

Directly arguing that defense counsel has suborned perjury or fabricated evidence has been held to be prejudicial error. *State v. Burnfin*, 771 S.W.2d 908, 912-13 (Mo.App.1989); *State v. Harris*, 662 S.W.2d 276, 277 (Mo.App.1983). However, the prosecutor here did not go that far when he said:

> I don't know whether the smokescreen [defense counsel is] creating is bothering you and creating an impression in your mind, creating confusion or, you know, you see, it's nothing more than a smokescreen. . .
>
> . . . .
>
> [Defense counsel has] got the nerve to show you these photographs that she said look like they were taken at nighttime. I guess you just have to believe with somebody that bold that she is going to suggest that was taken at night time as opposed to bad exposure, if you want to buy that boldness.

To suggest that the arguments advanced by defense counsel are "smokescreens" or "bold" fall short of accusing counsel of suborning perjury or the other egregious accusations against defense counsel that occurred in *Burnfin, Harris*, or other cases relied on by the defendant. At most, the comments by the prosecuting attorney were near error which, by definition, is not error. The point is denied.

C.

Lastly, Weaver puts forth a collection of allegedly improper arguments made by the state during the punishment phase, including the complaint that the prosecutor argued

matters outside the evidence that lacked evidentiary support. The prosecutor argued that had Weaver not run out of bullets he would have shot the arresting officer. He argued that if a prosecution witness had been out jogging a short while after the crime Weaver would have also shot that witness. Finally, he argued that the death penalty would be a deterrent. Our review of the penalty phase arguments discloses that these arguments are reasonable. The fact that the crime had been planned for the purpose of killing a witness and for the purpose of advancing what was apparently a very violent drug enterprise, permits an inference that the defendant had a high propensity for violent conduct in the future. The claim that the trial court abused its discretion in permitting the argument is without merit. The point is denied.

V.

Weaver complains that the prosecutor failed to disclose all evidence favorable to the accused in response to his pretrial requests. The details of the state's response to Weaver's pretrial request were not included in the defendant's record filed on appeal. Neither was the response to the request presented at the post-conviction hearing. As best can be determined from the record, the following apparently was disclosed to defense counsel prior to trial:

Tabler had been an inmate at the St. Louis County Correctional Facility for nine months prior to trial. Charges were pending against him for receiving stolen property and a misdemeanor offense for possession of marijuana. His prior convictions included sodomy and oral copulation in 1980 in California, for which he was sentenced to three years in prison and served two, rape in 1983 in California, upon which he received a three-year sentence and served twenty-two months in prison, and a possession of methamphetamines conviction in 1986 in California for which Tabler received six months, four

of which were served. It was also disclosed that Tabler was on parole from the state of California at the time of trial and was facing approximately a year and a half in prison there. Finally, it was disclosed that Tabler had made a deal with the state that in exchange for his testimony, the state would recommend a year for the receiving stolen property charge and six months for the possession of marijuana charge. The record also disclosed that Tabler had been charged as a persistent offender and was subject to an extended term of up to sixteen years but, because of the agreement made by the state, Tabler knew he could possibly get out of prison in five months time.

Weaver complains here that his constitutional right to a fair trial was violated because the state failed to disclose, in addition to the above, that (1) prior to the time Tabler came forward with the information about Weaver, he had been offered a five year sentence; (2) Tabler gave a false name when initially arrested, and (3) Tabler's bond had been set at $500,000.

The United States Supreme Court has held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215 (1963). A due process violation occurs "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). A reasonable probability of a different outcome exists where the failure to disclose the evidence "undermines confidence in the outcome of the trial." *Id.* at 682, 105 S.Ct. at 3383. Considering the information that was disclosed by the state showing Tabler to have been convicted of multiple contemptible crimes and that his testimony was given

in exchange for an extremely generous deal by the state makes the failures to disclose complained of by the defendant pale in comparison. The absence of the allegedly undisclosed evidence does not undermine confidence in the verdict. *See Kyles v. Whitley*, ___U.S. ___, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995).

In any event, the defendant has failed to make clear what was and was not disclosed prior to trial and has put this Court in the position of having to parse through the record to determine exactly what was not disclosed. That alone would be sufficient to deny this claim without further discussion. However, because this is a capital case, the Court has carefully reviewed the record before resolving this point against Weaver.

VI.

Weaver argues that in a letter written by the prosecutor two days after he was sentenced, the prosecutor improperly "attempted to poison" the trial judge who was then in the process of preparing a report pursuant to Supreme Court Rule 29.08(c). The purpose of the report is to assist this Court in its proportionality review. The prosecutor's letter and the police report attached recounted that one Willy Greer had made statements that he had attended a meeting which included Daryl Shurn where it was suggested that Weaver might be recruited not only to kill the victim here, but also to kill a police officer. The prosecutor's letter suggested that had defendant not been arrested in this matter, the officer would also have been killed.

The only authority cited by Weaver in support of his contention that the prosecutor's conduct was improper and requires reversal is *State v. Storey*, 901 S.W.2d 886 (Mo. banc 1995), where it is stated that a prosecutor has a duty to "serve justice, not just win the case." *Id.* at 901. Since the prosecutor's letter and the attached police report were received after sentencing and was not considered in any respect in determining

defendant's guilt or sentence, it is difficult to comprehend how it could have been prejudicial to the defendant, even assuming it is an improper communication. The point is denied.

VII.

Weaver complains that in the post-conviction relief proceeding the court clearly erred in impeding his attempts to obtain meaningful discovery by (a) overruling Weaver's motion to compel answers to interrogatories and requests for production, (b) quashing Weaver's deposition subpoenas, (c) denying his motion to compel answers to certified deposition questions, and (d) overruling motions to seek reconsideration of all the foregoing discovery rulings. Despite Weaver's suggestion that the motion court's handling of discovery matters should be reviewed merely for error, rulings on requests for discovery in post-conviction proceedings are reviewed to determine if the motion court clearly erred. *See State v. Six*, 805 S.W.2d 159, 173 (Mo. banc 1991), *cert. denied* 502 U.S. 871, 112 S.Ct. 206, 116 L.Ed.2d 165 (1991). Our review does not demonstrate that the motion court clearly erred in denying defendant's various discovery motions.

The discovery requests pertained to prosecutorial discretion to seek the death penalty, the personnel and hiring practices of the St. Louis County Prosecuting Attorney's Office, the involvement of any and all employees in defendant's and Shurn's cases, and the comparative cost of death penalties as opposed to life without parole. Defendant also sought to compel answers to numerous certified deposition questions. In one instance, the witness being deposed was a social worker who worked with Tabler and had been a former police officer. The trial court refused to compel the social worker to explain why he had left his employment as a police officer or about the time, place and content of his conversations with Tabler about the defendant's involvement in the crime. In addition, officer

Layshock, who had worked with a witness in getting him to testify against Shurn, was not required to answer questions at the post-conviction deposition as to whether he had been the subject of any disciplinary actions in the police department.

Nothing in defendant's argument suggests how such evidence may have been relevant to the issues raised in the post-conviction petition. The ruling of the motion court in rejecting the apparent use of discovery for a "fishing expedition" is not so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration of defendant's discovery requests. The denial of the discovery requests was not clearly erroneous.

VIII.

In his eighth point, Weaver violates Rule 84.04(d) by not setting forth briefly and concisely what action or ruling of the trial court is under review but rather presents a collage of various rulings both by the trial court and the post-conviction court denying relief for what he characterizes as "multiple acts of misconduct" by the prosecutor. Because of a violation of the rules on briefing, if this were not a death penalty case, none of the points raised would be considered. The Court shall attempt to discuss what it perceives to be the points raised.

A.

Under the first part of his argument, Weaver contends that the Rule 29.15 motion should have been sustained because of (1) the prosecutor's over-aggressive cross-examination of Weaver at trial about prior arrests, (2) over-aggressive prosecutorial examination about a sexual relationship Weaver had with a teenage girl who testified on defendant's behalf and (3) the prosecutor's allegedly improper closing argument that defense counsel was expensive because she was "terrific."

With regard to the cross-examination of defendant about prior arrests, it occurred after defendant and certain of his character witnesses had testified that in some neighborhoods in St. Louis, young black men are often arrested without cause. This evidence left the jury with the inference that while defendant had prior arrests, the arrests were unjustified. Under the doctrine of curative admissibility, the prosecutor was entitled to delve into the defendant's arrests, introducing otherwise inadmissible evidence to counteract the negative inferences. *Shurn*, 866 S.W.2d at 458. Any objection to this would have been without merit. This aspect of the claim is denied.

Defendant called a teenage female to explain why Weaver's car was in the Mansion Hills parking lot. The prosecutor cross-examined her regarding her sexual relationship with defendant. A witness's relationship with the defendant is a relevant subject of cross-examination to show the witness's bias or prejudice in favor of or against a defendant. *State v. Johnson*, 700 S.W.2d 815, 817 (Mo. banc 1985), *cert. denied* 476 U.S. 1119, 106 S.Ct. 1980, 90 L.Ed.2d 663 (1986). Here there was no objection to the evidence, there was no prosecutorial misconduct or ineffective assistance in defense counsel's failure to object. This claim is denied.

Defendant claims the prosecutor improperly commented on his right to counsel. This argument came in response to defense counsel's argument that Weaver was not a hit man. Defense counsel said:

> Any hit man does not have to struggle to get an attorney. He's got money all up there, sell some of his diamond rings and everything to get them, any hit man. But a William Weaver, a young man snatched off the street would have to struggle, would have to fight, would have to

> read [sic] his case, would have to try to get somebody to represent him.
>
> And a hit man wouldn't have to be driving the likes of a '73 Buick LeSabre. He'd have the fine kind of cars that this kind of money can buy.

To this, the prosecutor responded:

> So I don't know how [defense counsel's] fee was paid; but I guarantee you, she's not inexpensive, because she's terrific.

Parties have considerably more leeway when argument is retaliatory and during rebuttal. *Shurn*, 866 S.W.2d at 461. There was no error, plain or otherwise, in permitting the argument and counsel was not ineffective for failing to object.

B.

Defendant faults the prosecutor for allegedly failing to disclose a tape of a call to an emergency "911" number reporting that Taylor had been shot and giving a description of the suspect and for failing to disclose a notation on an arrest record in the prosecutor's file noting "D in maroon jacket." It is argued that the contents of the 911 tape and the notation on the police record "may have caused any description contained in the 911 tape to take on greater significance for purposes of additional discovery." The argument fails to disclose what significance the 911 tapes had to the defense. The argument also fails to disclose what relevance the notation "D in maroon jacket" might have had. To have any significance, the two matters require that a series of assumptions be made favorable to defendant's theory before a failure to disclose can be shown in any way to have been material or exculpatory. Here, Weaver has made no showing as to the materiality or exculpatory nature

of the tape or the notation. A defendant is not entitled to information on the mere possibility that it might be helpful but must make some "plausible showing" how the information would have been material or favorable. *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n. 15, 107 S.Ct. 989, 1002 n. 15, 94 L.Ed.2d 40 (1987). The mere possibility that these undisclosed items might have led to future discovery does not implicate a due process violation. See *State v. Parker*, 886 S.W.2d 908, 916-17 (Mo. banc 1994).

C.

In his third claim under his eighth point, Weaver argues the trial court erred in overruling objections to the admission of photographs seized during the search of the Shurns' residence and that the motion court clearly erred in denying his post-conviction motion that Westfall engaged in prosecutorial misconduct in offering the photographs in evidence. The photographs were introduced during rebuttal following testimony by defendant that he knew Daryl Shurn only "from the streets" and never met the Shurn brothers. The photographs were relevant in that they tended to impeach Weaver's testimony because he was pictured in several of the photographs. There was no error in admitting the photographs, plain or otherwise. These questions should have been properly raised on direct appeal rather than by post-conviction motion and that portion of the claim is denied for that reason. *See State v. Hunter*, 840 S.W.2d 850, 860 (Mo. banc 1992), *cert. denied* 509 U.S. 926, 113 S.Ct. 3047, 125 L.Ed.2d 732 (1992). Point VIII is denied.

IX.

Weaver argues that the autopsy report of the victim should not have been admitted into evidence because it was hearsay. One exception to the hearsay rule is that business

records, if properly identified, may be admitted. The custodian of the autopsy report testified as to its identity, the mode of preparation and that it was made in the regular course of business. On that basis, the court could receive the report in evidence. *§ 490.680*, RSMo 1994; *State v. Cheatham*, 340 S.W.2d 16, 19 (Mo.1960); *State v. Jennings*, 555 S.W.2d 366, 367 (Mo.App.1977).

X.

Under his tenth point, defendant again in violation of Rule 84.04(d) combines a series of eleven claims of ineffective assistance of counsel which he asserts should have been found by the motion court. To prevail, Weaver had to establish before the motion court that trial counsel failed to perform at the degree of skill, care or diligence of a reasonably competent attorney and that the performance was so prejudicial as to undermine the reliability of the result of the trial. *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052, 2064-65, 80 L.Ed.2d 674 (1984).

A.

The first claim is that competent counsel would have objected to Tabler's testimony that Weaver was a "hit man" because such testimony was evidence of other crimes. No evidence was adduced on this point at the post-conviction hearing. Trial counsel, though called to testify, was not asked why she had failed to object. Had an objection been made, it would have been of no avail. Tabler's testimony was reporting a statement made by the defendant in the context of explaining Weaver's involvement in the murder of Taylor. Among other justifications for admitting evidence of other crimes is where such evidence is admissible to establish motive. *State v. Oxford*, 791 S.W.2d 396, 399 (Mo. banc 1990). Evidence that Weaver

claimed to have been a killer for hire was relevant to establishing his motive for the murder of Taylor. While details of other murders may have been inadmissible, the evidence here was limited to what defendant told Tabler was his reason for involvement in this murder. Motive was a legitimate issue in the case.

B.

Weaver claims counsel was ineffective in failing to object to the giving of MAI-CR3d 313.44 (effective 1-1-87). This Court has held that instruction, when followed by MAI-CR3d 313.46 (effective 1-1-87), is constitutional and does not violate *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). *State v. Petary*, 790 S.W.2d 243, 245 (Mo. banc 1990). Here, MAI-CR3d 313.46 was given and any tinge of unconstitutionality removed.

C.

Weaver claims trial counsel was ineffective for failing to object to the prosecutor's inquiries regarding bullet holes in Weaver's body and for failing to present evidence that Weaver "was the victim of someone dissatisfied with his work" as a disc jockey. This claim was not preserved in the post-conviction relief motion and is deemed waived.

D.

Weaver next complains that counsel failed to seek a change of venue due to pretrial publicity. The trial court found that the voir dire record adequately covers that potential problem and that no prejudice resulted under *Strickland* by counsel's failure to seek a change of venue. The record supports that finding.

E.

Weaver next faults counsel for failing to bring out evidence regarding law enforcement's inadequate search for a gun. On that point, the motion court found that counsel's decision was not demonstrated to be prejudicial to the defendant's case under the *Strickland* standard. It might be added that failure to cross-examine a state's witness regarding how carefully a search was conducted was well within the range of permissible trial strategy where the primary thrust of the defense was misidentification.

F.

Weaver argues that counsel was ineffective in failing to object to a police officer's testimony about a lack of gunshot residue on Weaver's hands and counsel's failure to call a highway patrol chemist. The question by the state was prompted by defense counsel's questioning regarding gunshot residue tests and the negative results of those tests. It was appropriate on redirect to ask the officers if they had any explanation for the lack of the gunshot residue. No evidence was offered at the post-conviction relief hearing that the officers were not qualified to explain what factors might reduce the possibility of finding residue. Counsel is not ineffective for failing to make an objection unless it is apparent that the objection would have been meritorious. *Six*, 805 S.W.2d at 168.

The police officers testified that, based on their experience, passage of time between firing and the time of taking the tests (in this case, four to five hours) and perspiration and the wiping of hands can cause gunshot residue to dissipate. The chemist did not directly refute those statements but testified only that the number of *519 shots fired increases the chance of finding residue, that it is possible to find residue for up to six hours, although residue is more likely found within one and

one-half hours, and that the chemist had no opinion regarding the effect of perspiration. The chemist's testimony would not have established any defense but, at most, would have marginally impeached the testimony of the police officers regarding the absence of gunshot residue. It cannot be said that counsel's alleged failure undermines confidence in the outcome of the trial. Thus, Weaver has failed to establish the prejudice prong of the *Strickland* requirement.

G.

As to the claim that counsel should have more extensively cross-examined one of the officers about the gunshot residue evidence, the motion court found that there was no evidence to support this ground presented at the evidentiary hearing. Having failed to present evidence about what more extensive cross-examination would have disclosed, the claim was properly denied.

H.

Weaver claims that counsel should have objected to the evidence and argument of the prosecutor as to why no gunpowder residue was found on him. The evidence pointed to in support of this argument was that of the chemist, who indicated that "very little data was provided" by the officers responsible for obtaining the residue tests as to when the tests were performed or the type of weapon. From this, Weaver argues that counsel should have presented evidence demonstrating that the absent data precluded the state's explanation for the absent residue. As noted above, the additional information about when the residue tests were performed and the type of weapon were not shown to undermine the officers' explanation. Counsel's failure to present evidence which would have been purely impeachment on a collateral matter of the officers' lack of attention to detail in

reporting data to the chemist is clearly within the range of conduct by competent counsel. Weaver also fails to establish prejudice on this point.

I.

Weaver complains that his defense counsel should have put on evidence to correct one member of the venire panel who, in response to a question on voir dire about her feelings regarding the death penalty, said,

> I really haven't considered it in particular cases, but just as a fact of economics of the State keeping people for life and the cost and I would think that crime would go down if the death penalty were enforced more. So I haven't really thought about it in specific cases and thought that people should get it or not.

Even though made in the presence of other jurors, the isolated response did not so permeate the trial that those jurors hearing it would be unlikely to follow the instructions. The economic cost of imposing a death sentence is irrelevant to any issue submitted to the jury. Counsel cannot be faulted for failing to present irrelevant evidence. Neither error nor prejudice have been demonstrated. The claim is denied.

J.

Weaver argues that counsel failed to impeach a physician's testimony that no bullet fragments were recovered from the victim's body by the testimony of two police officers that bullet fragments were recovered following the autopsy. In this case, there was virtually no dispute but that the victim died of six traumatic gunshot wounds to the head. The presence or absence of fragments was not necessary to establish the cause

of death. The failure of counsel to present impeachment evidence regarding the matter of the recovery of bullet fragments is not prejudicial.

K.

Finally, Weaver challenges counsel's failure to present ballistics evidence showing more than one weapon was used. The evidence presented at the post-conviction hearing showed that the evidence on this point was inconclusive as to whether more than one weapon had been used. The motion court correctly found no prejudice in failing to present that evidence. In addition, the jury could have found that both Shurn and defendant had fired shots. The possibility that two guns might have been used was consistent with the state's case and would have done nothing to advance defendant's misidentification defense. This point is without merit.

XI.

In his eleventh point, Weaver argues that he should have been permitted to file a supplemental Rule 29.15 motion after the time for filing amendments to such motion had run. The only authority cited for that proposition is *State v. Chambers*, 891 S.W.2d 93 (Mo. banc 1994). In *Chambers* this Court observed that trial counsel's conduct was not ineffective in failing to object to an instruction. *Chambers* did not overrule the fundamental principle that the time limits for filing and amending pleadings under Rule 29.15 are valid and mandatory and the trial court is without authority to give additional time beyond that provided by Rule 29.15(f). *State v. Six*, 805 S.W.2d 159, 170 (Mo. banc 1991), *cert. denied* 502 U.S. 871, 112 S.Ct. 206, 116 L.Ed.2d 165 (1991); *Day v. State*, 770 S.W.2d 692, 695 (Mo. banc 1989). The motion court did not err in failing to permit a supplemental amended Rule 29.15 motion.

XII.

Christine Coslick testified that on July 6, 1987, at about 7:45 a.m., while watching from her apartment in the Mansion Hills apartment complex, she saw a black male being chased by two other black males down a nearby hill into a wooded area. One of those giving chase was wearing a maroon shirt. She heard shots from the wooded area, saw the two black males return to the car and then saw the one in the maroon shirt go back to the woods. She heard additional shots, saw the man in the maroon shirt return to the car and then observed the vehicle leave. The man in the maroon shirt came within fifty yards of Coslick. Later that same day, she viewed a lineup. At the lineup, Coslick remembered not only the shirt but the general build of the individual. The person she identified was defendant.

Witness Robert Mackin testified that on the same date at the same time he was laying in bed in his apartment and heard shots. Upon going to the window, he saw two men walking briskly away from the wooded area, one of whom appeared to be in a "dark red outfit." This individual went back to the car then returned to the wooded area where Mackin heard three more gunshots. That day Mackin was taken to a lineup where he picked out the defendant based on stature and clothing.

Weaver argues that because he was the only person in the lineup wearing maroon or red clothing, the trial court should have suppressed the identification. In order to succeed on this claim, he must carry a burden of proof that there was a "very substantial likelihood of irreparable misidentification." *Manson v. Brathwaite*, 432 U.S. 98, 116, 97 S.Ct. 2243, 2254, 53 L.Ed.2d 140 (1977).

Lineups have been held not to be impermissibly

suggestive merely because of the color or characteristics of the clothing of persons in the lineup. *State v. Tringl*, 848 S.W.2d 29, 32 (Mo.App.1993); *State v. Morant*, 758 S.W.2d 110, 117 (Mo.App.1988); State *v. Howard*, 699 S.W.2d 58, 59 (Mo.App.1985). The rule seems to be that a lineup will be impermissibly suggestive only if the clothing is the sole basis for identification.

The linchpin of due process in identification procedures is reliability, not suggestiveness. *Manson*, 432 U.S. at 114, 97 S.Ct. at 2253. Here the witnesses relied not only on the color of clothing but of defendant's general build and appearance. Both witnesses had an opportunity to view Weaver at the time of the crime. Both witnesses' attention had been turned to Weaver because of the gunshots. Their identification of Weaver was consistent with their description. Both witnesses expressed a rather high level of certainty at the confrontation. The confrontation occurred the same day as the shooting. Under the totality of the circumstances, their identification has sufficient indicia of reliability. *See State v. Hornbuckle*, 769 S.W.2d 89, 93 (Mo. banc 1989). It is true that in the case of both witnesses, identification was based largely on general build and clothing. However, it cannot be said on the record here that a "very substantial likelihood of irreparable misidentification" occurred. Short of such evidence, courts rely on the good sense and judgment of jurors for determining the trustworthiness of the identification.

> Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.... The defect, if there be one, goes to weight and not to substance.

Manson, 432 U.S. at 117, 97 S.Ct. at 2254.

Weaver further complains about the identification of defendant near the scene where he was arrested by the officer who pursued the vehicle in which defendant was riding. After defendant was arrested, he was brought back to the crime scene. He now argues that this procedure was so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.

To repeat, the linchpin of due process in identification procedures is reliability rather than suggestiveness. The reliability of identification is greatly enhanced by returning a freshly apprehended suspect to the scene of an offense for prompt identification by eyewitnesses. *State v. Pettit*, 719 S.W.2d 474, 477 (Mo.App.1986); *see also State v. Jackson*, 477 S.W.2d 47, 51-52 (Mo.1972). The identification by the pursuing officer at the scene was not impermissibly suggestive or unreliable.

XIII.

After the crash, police found keys in the Shurn vehicle. In the meantime, Weaver's car, a Buick LeSabre, was found in the Mansion Hills parking lot. The LeSabre was towed from the parking lot and placed in police custody. The keys found in the Shurn vehicle were tried and found to fit the doors, ignition, glove box and trunk of the LeSabre.

Weaver argues that no circumstances justified a warrantless search of his vehicle. Weaver does not seem to challenge the warrantless seizure of the vehicle. Here the vehicle was seized at the scene of a murder and was apparently used by Weaver as transportation to the scene of the crime. That justified the warrantless seizure of the vehicle.

Checking the locks of the LeSabre to see if the keys

found in the Shurn car fit the car found at the scene of the crime was not an unreasonable intrusion or violation of any expectation of privacy. Simply trying a key in an exterior lock of an automobile does not constitute a search. *United States v. Concepcion*, 942 F.2d 1170, 1172 (7th cir. 1991); *United States v. Lyons*, 898 F.2d 210, 212-13 (1st cir. 1990); *United States v. Grandstaff*, 813 F.2d 1353, 1358 n. 5 (9th cir. 1987). Because the officers had probable cause to seize the vehicle, they could also have searched the interior of the car for weapons and other instrumentalities of the crime without obtaining a warrant. *Chambers v. Maroney*, 399 U.S. 42, 48-52, 90 S.Ct. 1975, 1979-82, 26 L.Ed.2d 419 (1970). This would include opening the glove box. This point is denied.

XIV.

Weaver claims that the composition of the grand jury resulted from systematic exclusion of nonwhites, resulting in underrepresentation of African-Americans. Essentially the same data supporting the claim were submitted in *State v. Shurn*, 866 S.W.2d 447, 455 (Mo. banc 1993). There the data were held to be unpersuasive. No precedential value would be gained by reconsidering the claim here. The point is denied.

XV.

Weaver's fifteenth point makes a four-pronged attack on the constitutionality of the death penalty. He claims it is unconstitutional because of (1) vagueness of the aggravating factor of "depravity of mind," (2) inadequacy of proportionality review, (3) unrestricted prosecutorial discretion, and (4) failure of the death penalty to serve legitimate government purposes.

Weaver claims the "depravity of mind" aggravating factor is excessively vague.

We do not have to decide whether, in this case, the depravity of mind aggravating factor was excessively vague because the jury found two valid statutory aggravating circumstances under § 565.032.2(12). They found he murdered a potential witness and acted as an agent for another. We will affirm a death sentence based on the finding of one valid statutory aggravating circumstance, regardless of the failure of another. *State v. Sloan*, 756 S.W.2d 503, 509 (Mo. banc 1988), *cert. denied* 489 U.S. 1040, 109 S.Ct. 1174, 103 L.Ed.2d 236 (1989).

The claim of unconstitutionality in the proportionality review must also fail. The constitution does not require proportionality review. Rather, it is required by statute. *State v. Ramsey*, 864 S.W.2d 320, 328 (Mo. banc 1993), *cert. denied* 511 U.S. 1078, 114 S.Ct. 1664, 128 L.Ed.2d 380 (1993); *§ 565.035*, RSMo 1994. This Court has rejected the argument that it must engage in a statistical analysis of cases to determine whether the punishment is disproportional. *Ramsey*, 864 S.W.2d at 327-28. The Court's method of proportionality review does not violate Weaver's due process rights, his right to a fair trial or his right to be free from cruel and unusual punishment under the state or federal constitutions.

Similarly, no authority is cited or found holding that the prosecutorial discretion to seek the death penalty is unconstitutional. This claim lacks merit and has been rejected on numerous occasions. *Parker*, 886 S.W.2d at 933; *Ramsey*, 864 S.W.2d at 330; *see also Gregg v. Georgia*, 428 U.S. 153, 199, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976).

The final claim under Point Fifteen is that the Missouri death penalty statute violates Weaver's constitutional rights because no legitimate government goal is advanced by such punishment and it is, therefore, excessive. This claim, too, has been repeatedly rejected and no precedential purpose would be

served in discussing it again here. The claim is denied.

XVI.

In his sixteenth point, Weaver argues that the judgment in the post-conviction hearing was invalidated because "most of the 'findings' either adopted verbatim or with only minor editorial changes [the state's] proposed findings." This Court's review is limited to determining whether the motion court clearly erred. *Rule 29.15(j)*. While trial courts must act independently in making findings of fact and conclusions of law, it is not error for a trial court to request or receive proposed findings and, in appropriate cases, to adopt those findings. The point is denied.

XVII.

Various claims are raised in his seventeenth through twenty-first points which have been argued and found to be without merit in recent cases before this Court. Specifically, Point XVII argues that our pattern instructions, which tell the jury "If you do not find the defendant guilty of murder in the first degree, you must consider whether or not he is guilty of murder in the second degree." is an "acquittal first" instruction and violates due process. This claim has recently been denied. *State v. Wise*, 879 S.W.2d 494, 517 (Mo. banc 1994), *cert. denied* 513 U.S. 1093, 115 S.Ct. 757, 130 L.Ed.2d 656 (1995). In Point XVIII Weaver argues that he was denied due process because individual voir dire was not allowed of the jurors. This Court has repeatedly rejected that claim. *Parker*, 886 S.W.2d at 921; *State v. Whitfield*, 837 S.W.2d 503, 509 (Mo. banc 1992); *State v. Ervin*, 835 S.W.2d 905, 917 (Mo. banc 1992). In his nineteenth point, Weaver claims that he should have a separate jury to determine punishment. This claim has also often been rejected by this Court. Weaver's twentieth claim is that the trial court erred in failing to give a non-MAI cautionary instruction.

Again, that claim has recently been denied. *Parker*, 886 S.W.2d at 921; *State v. Kilgore*, 771 S.W.2d 57, 63 (Mo. banc 1989). Finally, Weaver challenges the instruction on reasonable doubt. This complaint has been presented and denied on numerous occasions. No precedential value would be served by further discussion of the final five points. *See Rule 84.16*. The claims are denied.

XVIII.

The Court has examined the evidence in this case and determines that the sentence, when compared to similar cases, is neither excessive nor disproportionate. *See Shurn*, 866 S.W.2d at 467; *Parker*, 886 S.W.2d at 933-34; *State v. Williams*, 652 S.W.2d 102, 113-14 (Mo. banc 1983); *State v. Blair*, 638 S.W.2d 739, 759-60 (Mo. banc 1982), *affirmed* 459 U.S. 1188, 103 S.Ct. 838, 74 L.Ed.2d 1030 (1983). In each of the above cases, defendants were sentenced to death who had murdered victims who were witnesses or potential witnesses.

CONCLUSION

The judgment imposing the death penalty for murder in the first degree is affirmed. The judgment denying relief from the post-conviction relief proceeding is affirmed.

John C. Holstein, Chief Justice

BENTON, PRICE, LIMBAUGH, ROBERTSON and COVINGTON, JJ., and EDWARDS, Senior Judge, concur.

WHITE, J., not participating because not a member of the Court when case was submitted.

IN THE CIRCUIT OF ST. LOUIS COUNTY
STATE OF MISSOURI

WILLIAM L. WEAVER, Movant,	)	
	)	Cause No. 603615
vs.	)	Division 15
	)	
STATE OF MISSOURI, Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
FINDINGS OF FACT

1. On September 15, 1988; the Jury found William L. Weaver guilty of murder in the first degree and subsequently sentenced to death.

2. William Weaver was represented by Ms. Doris Black, Attorney at Law.

3. November 27, 1989; William Weaver filed this post-conviction motion pursuant to Missouri Supreme Court Rule of Criminal Procedure 29.15.

4. May 9, 1990, movant, filed an amended motion.

5. Numerous discovery efforts were made by movant's appointment attorney which resulted in various depositions of witnesses being taken, and also which resulted in the filing of various Motions to Compel, Motions for Sanctions, Motions to Quash and Motions to

Dismiss.

6. December 1, 1992; Motions to compel, sanctions, quash and dismissal were over ruled.

7. December 17, 1992; Motion to reconsider the ruling of December 1, 1992, over ruled.

8. May 26, 1993, Senior Judge Herbert Lasky assigned T case.

9. On September 8, 1993, movant filed a Supplemental Motion to Vacate his Sentence and Judgment and a Motion to Reconsider Order of December 1, 1992.

10. September 13, 14 and 15, 1993, the Court held an evidentiary hearing, at which time it was continued to be reset caused by the unavailability of a witness.

11. September 29, 1993, proceedings were suspended pending the outcome of a Writ of Probation.

12. March 2, 1994, after the Writ was resolved, the Court overruled movant's Motion to Reconsider the December 1, 1992, order denying Movant's Motion to Reconsider.

13. April 12, 1994, discovery inspect in conference held.

14. July 7, 1994, the Court sustained the State's objection to the filing of movant's Supplemental Motion to

Vacate his Judgment and Sentence as untimely under Rule 29.15.

15. The evidentiary hearing concluded on July 28, 1994, with leave being granted to movant to file an affidavit by July 15, 1994.

16. Point one (1): Movant's pro se motion alleges that his trial attorney, Ms. Doris Black, was ineffective in not calling Mr. Carl Rothove as an expert witness to testify about gunshot residue. Mr. Rothove testified at the evidentiary hearing, the Court finds that the witness testimony was speculative. Movant has failed to demonstrate any prejudice on this issue. Point denied.

17. Point two (2): Movant's trial counsel failed to object and move for a mistrial when the State presented the testimony of Robert D. Tabler who testified that movant admitted to him that he had killed other people. The Court finds that objection and request for a mistrial would not have been granted had Ms. Black made such an objection, her failure to do so is not ineffective assistance. Point denied.

18. Point three (3): Counsel's failure to request a change of venue. Movant carried the burden to prove that such a request would have been granted or was appropriate. Point denied.

19. Point four (4): Counsel's failure to object to the prosecutor referring to movant as a Hit Man. The Court finds that the objection would not have been sustained. Point denied.

20. Point five (5): The failure of counsel to object to the aggravating circumstance that the murder involved torture or depravity of mind. Movant bases his allegation on the Report of the Trial Judge which state that there was no torture. The Court finds supporting evidence. Point denied.

21. Point six (6): Movant's pro se petition alleges ineffective assistance based upon counsel allowing the jury to be influenced by passion, prejudice and other arbitrary factors. Movant fails to plead facts which, if true, would entitle him to relief. He has pleaded only conclusions in this point. Denied.

22. Point seven (7): Movant's pro se petition alleges ineffective assistance in that counsel allowed the prosecutor to state to the jury that the victim was killed because he was a potential witness. Movant claims that there was no evidence that movant knew of that status. The point fails to allege what his counsel should have done. The Court finds there was sufficient evidence that movant's codefendant knew and movant was charged to have acted together with him. Point denied.

23. Point eight (8): Counsel failed to object to testimony that bullets taken from the victim's head were .357 caliber. No evidence was presented. Denied.

24. Point nine (9): Counsel's failure to request a mistrial when the prosecutor questioned a witness in regard to the identification on the defendant. Sufficient facts have not been alleged from which it can be determined that if true, would he be entitled to relief. Point denied.

25. Point ten (10): Counsel's failure to request mistrials during the State's closing argument because of the prosecutor's prejudicial remarks. The Court finds nothing improper within the State's closing argument. Point denied.

26. Point (3-A): Movant's amended motion alleges that movant was denied his right to an independent and impartial trial judge because Judge Voorhees, the trial judge, failed to recuse himself when he had been the trial judge who presided over the codefendant's trial. Subparagraph (i) alleges that Judge Voorhees should have allowed individual voir dire. This is a matter which is discretionary with the Court and so this sub-point fails. Subparagraph (ii) alleges that Judge Voorhees was prejudiced by having heard the testimony from the codefendant's trial. Movant merely speculates that it was "reasonably likely" that Judge Voorhees was impacted by the prior trial's evidence and movant has failed to present evidence that Judge Voorhees actually was impacted by it. Point denied.

27. Point (3-B): Movant's amended motion alleges trial error by the Court for refusing to give an instruction. This is not a cognizable issue for a 29.15 motion and is an issue for the trial appeal. Denied.

28. Point (4-A): Counsel's failure to adequately challenge the Grand Jury selection procedures of St. Louis County. Movant pleads conclusion here, not facts. Movant fails to state what counsel would have discovered in an "adequate" investigation. Point denied.

29. Point (4(b): Counsel's failure to challenge the petit jury selection procedures of St. Louis County. Movant has failed to plead facts which would entitled him to relief on this point. Denied.

30. Point 4 (c): Counsel's failure to challenge the procedures of St. Louis County for excusing qualified jurors. Movant claims that the current procedures systematically exclude black men and women of all colors. Movant presented no evidence to support this claim. Point denied.

31. Point 4 (d) (i): Counsel's failure to investigate and present evidence that the Prosecuting Attorney for St. Louis county exercises his discretion in death penalty cases in an arbitrary, capricious, and discriminatory manner. The Court finds that the prosecutor attorney did not abuse his discretion. Point denied.

32. Point 4 (d) (ii): Counsel's failure to challenge the Supreme Court's proportionality review of murder cases. The Supreme Court complied with the requirements of Section 565.035 RSMo. Point denied.

33. Point 4 (e) (i): Counsel's failure to investigate and present various evidence. Movant fails to plead facts which would if true, entitle him to relief. Point denied.

34. Point 4 (e) (ii): Counsel's failure to adequately investigate the background of Robert Tabler and the deal he struck in exchange for his testimony. Movant alleges that his counsel would have done a better job of cross-examination has she done the things he now alleges. The

Court finds that Ms. Black did an excellent job of cross-examination on Robert Tabler. Point denied.

35. Point 4 (e) (iv): Assistance based upon Counsel's failure to object to the testimony of Robert Tabler that movant has admitted to him that he was a Hit Man and has committed prior murders at the direction of others. The Court notes that counsel objected at trial and included the ground in the Motion for New Trial. Point denied.

36. Point 4 (e) (v): Counsel's failure to have movant try on the tennis shoe in the trial to show that it did not fit. No evidence was presented in the evidentiary hearing to support this ground. Point denied.

37. Point 4 (e) (vi): The amended motion alleges ineffective assistance based upon counsel's failure to present evidence of motel records. No evidence was presented on this point in the evidentiary hearing. Point denied.

38. Point 4 (e) (vii): Counsel's failure to present evidence of an expert on eyewitness identification to rebut the testimony of the State's witnesses. No evidence on this point was presented at the evidentiary hearing. Point denied.

39. Point 4 (e) (viii): Counsel's failure to cross-examine Detective Cantwell more extensively abut the gunshot residue evidence. No evidence to support this ground was presented at the evidentiary hearing. Point denied.

40. Point 4 (e) (ix): Counsel's soliciting and/or failure to object to the testimony of Detectives Lee and Cantwell about the results of the gunshot residue tests. The negative result is consistent with movant's defense. Point denied.

41. Point 4 (e) (x): Counsel's failure to object to the testimony about the gunshot residue tests results, with specific Point 4 (e) (x), no evidence was presented at the evidentiary hearing to support the allegation. Point denied.

42. Point 4 (e) (xi): Counsel allowing Cantwell to testify that no identifiable fingerprints had been found because he is not an expert on latent print examination. No evidence presented to support this allegation that identifiable prints were found or to introduce evidence that any were found. Point denied.

43. Point 4 (e) (xii): Counsel's failure to elicit from Cantwell the testimony he gave at the Shurn trial about how exhaustive the search for weapons was. The jury heard that no gun was found. This was consistent with movant's defense. The Court finds no prejudice. Point denied.

44. Point 4 (e) (xiii): Of the amended motion alleges ineffective assistance based upon Counsel's failure to call an expert to testify that the bullets recovered from the victim could have been either .38 or .357 caliber. The Court finds no prejudice. Point denied.

45. Point 4 (e) (xiv): Counsel's failure to

investigate the involvement of Detectives Dobbins and Leyshock. There was no evidence offered in support of this allegation at the evidence hearing. Point denied.

46. Point 4 (e) (xv): Counsel introducing evidence that the victim's briefcase contained a gun. The possibility that the victim would have had other enemies fits movant's defense strategy that someone else committed the murder. There is no prejudice shown. Point denied.

47. Point 4 (e) (xvi): Of the amended motion alleges ineffective assistance based upon Counsel's failure to object to the testimony of threats that the victim had hear. An objection would not have been successful. Point denied.

48. Point 4 (e) (xvii): Counsel's failure to ask for a continuance to investigate Det. Leyshock's testimony that he had heard on the streets that the victim's life has been threatened. No evidence was presented at the evidentiary hearing on this claim. Point denied.

49. Point 4 (e) (xviii): Of the amended motions alleges ineffective assistance based upon counsel's failure to object to Instruction No. 12. No evidence was presented at the hearing on this claim but the Court notes that objections to instructions need not be made at trial to preserve the issue for appeal. This claim is therefore not cognizable here. Point denied.

50. Point 4 (e) (xix): Counsel's failure to object to the testimony of Det. Leyshock, and the testimonies of

Assistant United State Attorney Debra Herzog and J. Bennett Clark to a "confrontation" that occurred at the Federal Courthouse between Larry Shurn and the victim. The Court notes that this point is included in the Motion for New Trial dn is therefore preserved for appeal and not cognizable here. Point denied.

51. Point 4 (e) (xx): Counsel's failure to call Mr. C. Clifford Schwarts to testify that he witnessed the encounter above and that he dd not see anything threatening about it. Mr. Schwarts testified at the evidentiary hearing and could not say that the "thumbs down" incident did not occur, only that while he was watching it did not occur and that he was not watching the whole time. His testimony trial would not have changed the outcome. Point denied.

52. Point 4 (e) (xxi): Counsel's failure to prevent Dr. Turgeon from testifying since he was endorsed on short notice due to Dr. Gantner's illness. The Court notes that this issue is included in the Motion for New Trial and so is therefore not cognizable here. Point denied.

53. Point 4 (e) (xxii) and 4 (e) (xxiii): Are denied no evidence was presented on either point in the evidentiary hearing.

54. Point 4 (e) (xxiv): Counsel's failure to introduce movant's arrest records to show that he had never been arrested in possession of drugs, large sums of money, fancy cars or weapons. No evidence was presented at the evidentiary hearing on this claim. Point denied.

55. Point 4 (f): Counsel's failure to peremptorily

strike juror James Smith at movant's request due to his prior relationship with Larry Freeman, the prosecutor's investigator. No evidence that movant made such a request was presented at the evidentiary hearing. Point 4 (f) also alleges that movant was not present at the instruction conference. He does not have a constitutional right to be present. Point denied.

56. Point 4 (g): Counsel's failure to adequately voir dire on aggravating and mitigating circumstances. Movant fails to allege what counsel should have asked or how she should have conducted her voir dire. Further, there was not evidence presented at the evidentiary hearing to support the claim that the jury weighted only those aggravating and mitigating circumstances which they has unanimously found to exist. Point denied.

57. Point 4 (h): Counsel offering Instruction No. 25 and in not objecting to its form because it precluded jurors from considering a mitigating circumstance unless it was found to exist by all twelve jurors. As noted earlier, objections to instructions need not be made at trial in order to preserve the issue for appeal. Counsel cannot be ineffective in failing to object when no objection is necessary. In addition, the jury was instructed that they did not have to give the death penalty.

58. Point 4 (i): Of the amended motion alleges ineffective assistance based upon Counsel's failure to rehabilitate jurors Boehn, Abdelmeguid, Gralnick and Tipple. Movant has failed to plead facts and failed to present any evidence. Denied.

59. Point 4 (j): Counsel's failure to seek a change of venue because of pretrial publicity. The voir dire records adequately covers that potential problem. The Court finds no prejudice or bias.

60. Point 4 (k): Counsel's failure to object to certain questions from the prosecutor on voir dire. The Point goes on to allege that movant was prejudiced because the jury was misled. The Court finds no prejudice. Point denied.

61. Point 4 (l): Counsel's failure to object to Instruction No. 23 because it included the aggravating circumstances that the murder involved "depravity of mind" which movant claims is unconstitutionally vague. Movant's support for this is the jury's note that they wanted a definition for it. The Court again notes that no object is required to preserve the issue for appeal.

62. Point 4 (m): Counsel's failure to provide evidence for a pretrial motion. Movant has not pleaded facts to support this allegation, no evidence offered at the evidentiary hearing. Movant also claims that the lack of child care resulted in several jurors being excused for cause thus depriving him of a jury representative of a fair cross-section of the community. The constitutional guarantee of a fair and impartial jury is measured by the actual jury that is seated for the trial. Movant has not presented any evidence that the jury which heard the case was not a fair representation of cross-section of the community. Point denied.

63. Point 4 (n): Counsel's failure to challenge the

presentence investigation and the Court's consideration of same. The Court is presumed to ignore inadmissible and inflammatory comments in a presentence investigation and so therefore this claim is without merit. Point denied.

64. Point 5 (a): Alleges prosecutor misconduct and includes a long list of things that the prosecutor failed to disclose. After a thorough review of the testimony from the evidentiary hearing as well as **in camera** inspection of the prosecutor's trial file, this Court finds no merit in movant's claim. Point denied.

65. Point 5 (b): Alleges prosecutor misconduct by the prosecutor asking witnesses certain questions on cross-examination and in presenting certain evidence with the sole purpose being to inflame the jury's prejudices against movant. A wide latitude is given to an attorney on cross-examination. This Court finds, after review of the allegations within the context of the trial, that there is no merit to movant's claim in Point 5(b). The prosecutor did not do the things complained of for the sole purpose of inflaming the passions of the jury, but for legitimate purposes such as impeaching defense witnesses, attacking their credibility, and proving that movant and Shurn were more than mere innocent acquaintances. Point denied.

6. Point 5 (c): Alleges prosecutor misconduct in that the prosecutor's closing arguments violated movant's rights to a fair trial and due process. Movant claims that the arguments in both phases were improper. The prosecutor's arguments were not calculated to mislead the jury, not were they calculated to inflame the juror's passions. The prosecutor properly argued the reasonable

inferences from the evidence and properly argued that the death sentence could be a deterrent to commission of future crimes. The prosecutor's arguments were legitimate appeals to the jury to impose the maximum sentence. Point denied.

67. Point 5 (d): Is included in movant's Motion for New Trial. Point denied.

68. Point 6: Of the amended motion alleges that the jury saw movant in shackles. There was no evidence presented on this claim at the evidentiary hearing, nor were facts pleaded in the motion which demonstrate that any prejudice occurred. Point denied.

69. Point 7: Of the amended motions alleges that the trial court poisoned the minds of the Supreme Court by submitting the Report of the Trial Judge with attached comments by the prosecutor. Point denied.

70. Point 9: Of the amended motion alleges that the cumulative effect of all the above claims violates movant's rights. Point denied.

CONCLUSIONS OF LAW

1. In a motion for post-conviction relief, movant has the burden of establishing his right to relief by a preponderance of the evidence.

2. Where an evidentiary hearing is granted, any allegation about which no evidence is offered is deemed abandoned.

3. When movant claims ineffective assistance of counsel, he must demonstrate that counsel's performance was deficient and that he was prejudiced therefore. "Deficient" means less than the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances. "Prejudice" means that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.

4. Counsel is presumed to have rendered adequate assistance, and to have made all significant decisions in the exercise of reasonable professional judgment.

5. Matters of trial court error, instructional error, and any other matters preserved for direct appeal should not be consider in a post-conviction proceeding.

6. Movant cannot raise matter of trial error without alleging and ultimately proving that the grounds amount to constitutional violations and that exceptional circumstances exist to justify not raising those ground on direct appeal.

7. Movant has failed to establish by a preponderance of the evidence that there was a reasonable probability that the result would have been different has his attorney acted in a manner other than as alleged.

8. Movant has failed to establish by a preponderance of evidence that he is entitled to the relief sought.

9. Movant has failed to demonstrate that his trial

counsel gave a deficient performance.

10. Movant has failed to overcome the presumptions of competency of his trial counsel.

11. A Court may take judicial notice of its files and records in a post-conviction proceeding.

12. The failure to object does not rise to the level of ineffective assistance of counsel unless movant has suffered substantial deprivation o the right to a fair trial.

13. Movant did not suffer a substantial deprivation of the right to a fair trial as a result of trial counsel's alleged failure to object.

ORDER

WHEREFORE, after being fully advised in the premises, it is the Order of the Court that the motion of William Weaver, filed pursuant to the provisions of Missouri Supreme Court Rule 29.15, to set aside his conviction and sentence in Cause No. 565118B in the Circuit Court of the County of St. Louis, State of Missouri, is Overruled and Denied.

SO ORDERED:

_____

Honorable Herbert Lasky, Sr. Judge

Entered this 29th day of Nov., 1994.

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI, Respondent, vs. WILLIAM L. WEAVER, Appellant.	))))))	No. 71051

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, STATE OF MISSOURI
Honorable Alphonso H. Voorhees, Judge

STATE OF MISSOURI, Plaintiff, vs. WILLIAM L. WEAVER, Defendant.	)))))))	Case No. 565118B Division No. 13

TRANSCRIPT ON APPEAL

VOLUME V

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Reporter: Patricia K. Davis, CCR

CLOSING ARGUMENT ON BEHALF OF THE STATE

MR. WESTFALL: Ladies and gentlemen, in a little while longer, the case will be in your hands for the punishment and then the whole trial will be finished. Don't look back on your verdict. You people made the right decision last night. You knew it when you made it. Don't look back on it. Don't let Mr. Weaver get into your mind and play games by telling you he's innocent, hoping that that will make you say life rather than death simply because there is some possibility that he's innocent.

The State's case - - the evidence in this case once you threw out all the smoke screens and evaluated his perjury that his people put on, his guilt was obvious and you arrived at that verdict. Don't second-guess your verdict. I mean I think you should be offended by the fact that he's still maintaining his innocence. It's obvious why he's doing it. He wants you to second-guess your verdict and spare his life on that basis alone.

If you want to spare his life, that's your discretion; that's your decision. But do it for the right reasons, not the wrong ones. He's guilty and you know it. So don't let him get into your brain. Don't let him do that to you. He can't admit his guilt because then he'd be in real trouble because he'd be telling you he's a hit man. So he's telling you still that he's not guilty, but he's hoping that by saying that you'll come off the death penalty.

Maybe this is an exercise in futility. Maybe I'm wasting my time in even talking to you about death because maybe your minds have already been made up. I know there's been a lot of crying going on. I can understand that. But I know what my responsibilities are and I know what the right punishment is in this case. So, if I'm wasting my time, I choose to waste it anyway in an effort to persuade you to do what's right because the death penalty is what's right here.

I could have called Mrs. Charles Taylor to the stand. I could have asked Mrs. Taylor, you know, did you love your husband? Yes, I loved him. Was he good to you? Yeah, he was a good husband. Do you still love him? Yeah. Do you miss him? Sure, I miss him. And she probably would have started crying. I could have brought some relatives and friends of Charles Taylor's and asked them: Do you miss Charles? Was he a decent man?

But that's not really what's at stake here. She gets to visit him at the cemetery. You can let Mr. Weaver's friends and relatives visit him in the penitentiary? He killed Charles Taylor in cold blood, six bullets in gang-land execution style; and, yet, you're going to let his people visit him at the penitentiary? And Charles Taylor's people have to go to the grave to visit him.

You've got the remember what we're dealing with here. This is bigger than William Weaver. It's bigger than Daryl Shurn. It's bigger than all of us. The crime that occurred July the 6th of last year is our worst nightmare. It's the crime that strikes right at the core of society. It scarces us all. The execution of witnesses in a

Federal drug case.

MS. BLACK: Objection to the term used, "execution," Your Honor. It's improper closing.

THE COURT: Overruled.

MR. WESTFALL: It strikes right at the heart of our system. You've got to look beyond William Weaver. This isn't personal. This is business. You people represent the entire community. You represent society. You have to give a message here. You have to tell the William Wavers and the Daryl Shurns of the world, and you have to be willing to look them right in the eye when you do it, that there's a point at which we won't allow you to go. And when you do, prison's too good. It's the death penalty.

Sometimes killing is not only fair and justified; it's right. Sometimes it's your duty. There are times when you have to kill in this life and it's the right thing to do. If Charles Taylor had been able to get his gun out that day, would you have said it was right for him to kill Weaver and Shurn? Of course, you would. It would have been self-defense. Well it was right to kill then and it's right to kill him now.

If Jerry Leyshock had just on a hunch gone there that morning because of his conversation with Charles Taylor, "the street talk is that Shurn's coming after me," and just went out there on a hunch and he saw what was happening and he was able to kill the two of them before they killed Charles Taylor - -

MS. BLACK: Objection, Your Honor. This is totally im proper argument. I want to make a record on this. I'd like to make a record.

THE COURT: I will save you time and I will sustain the objection.

MS. BLACK: I ask the jury to instructed to disregard it.

THE COURT: The jury will disregard the portion of the argument regarding Mr. Leyshock appearing at the scene and doing certain things.

MR. WESTFALL: I'll leave you with Charles Taylor. Would you have said he was right in killing them if he could have saved his own life? Of course, you would. So I'll take their lives, Mr. Weaver's life for what he did to Charles Taylor a year ago.

The Shurn family? Scum, rock bottom scum. Selling drugs, PCP, heroin. High level drug people. Organized Crime Task Force prosecuting Charles and Larry last year. Charles Taylor is a witness for the State. And who does this high level drug family choose to do their execution, do their killing? They choose William Weaver. Don't lose sight of that fact. A high level drug operation chooses William Weaver to do their killing.

Now, obviously, these people that came in here today - - and I feel sorry for them. They are all decent people and they obviously don't know the William Weaver that was in business July 6th of last year. They know the

Dr. Jekyl side of him. They don't know the Mr. Hyde. We obviously have a man here that on one hand can do things to fool the world while on the other hand he's a cold-blooded executioner.

I can't emphasize too much don't second-guess you verdict in that regard. It was the right verdict and you know it and you're comfortable with it. Now, the only decision is should his life be spared. And I say to you: Why should it be? When you were selected as jurors, you all said, yes, in the right case I can give the death penalty. And one or two of you even said you would favor the death penalty in the right case. Well, if this isn't it, what would it be? If this isn't a case where you can impose a death penalty, where people go out to Mr. Taylor's house to kill him because he's a witness, then what case would you ever return it in? So if you were being honest to me when you said that, then that has to be the case.

MS. BLACK: Objection, Your Honor. That calls for improper argument. May be approach the bench, please?

MR. WESTFALL: Judge, would you save my time?

(Counsel approached the bench and the following proceeding were had:)

MS BLACK: I object to the State using this somewhat threatening statement to the jury that if they don't come back with death in this particular case, then there's no other case that they could come back with a death for and would come back with death for. I think it's improper argument to this jury. It is intended to impose

fear and intimidation on this jury into arriving at a verdict of death. And I ask this jury - - the judge to sustain the objection and instruct the jury to disregard his last comment and to admonish counsel against making those kids of comments to the jury.

MR. WESTFALL: Judge, I'm simply speaking hypothetically that if this isn't the case that calls for a death penalty, what type of case would?

THE COURT: I'll overrule the objection.

(The proceedings returned to open court.)

MR. WESTFALL: If this isn't a case that calls for the death penalty, I can't imagine one that would. And, yet, you people all told me in a given case you could do it. Some of you even said that you would prefer it, that you would favor it in the right case. This is the right case.

William Weaver ran out of bullets. Think back to the evidence. I'm sure you discussed it yesterday. But when you discuss his fate, think about the evidence. He ran out of bullets and Charles Taylor was still alive. So when they go back, he's reloading. All six spent casings are on the floorboard right where he was and he's reloading while Daryl is driving and they stop and he goes back and shoots him some more. Then I'm going to tell you that he was out of bullets, because if he hadn't been, Officer Crain would have been dead because he would have kept the gun on him instead of pitching it out of the car.

MS. BLACK: I'm going to object, Your Honor. There's no evidence that William Weaver threatened Officer Crain or had a gun when he saw Officer Crain. This is totally improper argument.

THE COURT: Overruled.

MS. BLACK: And prejudicial.

MR. WESTFALL: Judge, this is argument.

THE COURT: Overruled.

MR. WESTFALL: If he had still had the gun and still had bullets, do you think he would have sure surrendered as meek as a lamb? I mean, of course, he wouldn't have surrendered. What if Jean Henson would have been jogging a little bit later than she was and coming around the woods or the clearing at the time of the murder and he still had some bullets. You think she would be alive?

MS. BLACK: I'm going to object, Your Honor. This is improper. It's intending to invoke sympathy and outrage by this jury. There's no evidence that the person who killed Charles Taylor ever tried to kill Jean Henson. There's no evidence of that.

THE COURT: Overruled.

MR. WESTFALL: You know this is closing argument and I'm giving you what I think is a logical inference. If a hit man is interrupted during the middle of

his execution, do you think he's not going to kill the witness? Hit men don't have records. Do you know why? Because hit men don't leave victims. They kill their victims. That's why they don't have records. They don't leave victims. And William Weaver wouldn't have left Crain alive if he could have killed him. He was going to get away - -

MS. BLACK: I want to make the same objection, Your Honor, that it may be continuing any time he refers to any killing of Officer Crain or Ms. Henson. Unless the Court wants me to object each time he makes that statement, I would like it to be continuing to that type of argument.

THE COURT: If you want the objection to be continuing anytime he mentions either of them, I think - - well, I think you'd better not make it continuing.

MS. BLACK: Well, then I'm making it again.

THE COURT: You'd better. I'll overrule the objection.

MR. WESTFALL: There are times, jurors, when you have to be hard in this life. You have to be harder than the bad guys. Because if they are harder than us, then all the rules disappear and the jungle prevails and the animals reign in the jungle and we can't have that, not if we want to live in a civilized society where we can walk our streets and protect our property. Sometimes you have to be harder than they are. And this is the kind of case where you're going to have to return that sort of a sentence.

You've got to give the message to the Shurns and the Weavers of the world that we just won't tolerate it and we have got the guts to do it and we have got the backbone to do it, no matter how much crying or how much weeping there is. Mr. Weaver hasn't cried all week. When the verdict came back last night, he didn't blink. Peculiar that he's crying today when his life's on the line. Peculiar. I guess not too peculiar. He didn't blink last night when the verdict cam back. He doesn't blink. He makes other people blink. Charles Taylor crawling along the ground. There's no question in your mind what Weaver did last July. Don't lose sight of that fact. There is no question what he did.

But think about it. Think about the fear, the terror, the agony in Charles Taylor's mind as he's crawling into the woods not knowing whether he's going to live or die and not knowing if they are coming back, but knowing that he's still alive. And Weaver knew he was still alive. So Weaver had to get more bullets, had to come back and finish him with six bullets in the head. I mean they chased him down like an animal and they executed him. I mean if this isn't the case for the death penalty, then there's no case you'll do it. You've just got to reach down and do what you know is right.

There are certain times when doing what's right is tough and it will be touch in this case. But just like you won't look back on your verdict and never second-guess it, you won't look back on this either. You'll be comfortable with it. You'll be able to sleep. You'll know that you did the right thing.

Officer Gariner put his life on the line in chasing these people and he wasn't wasting his time; that's the message you want to give to the good guys in this case. The message you want to give to the bad guys is clear: Don't do it or we're going to take your life. We've got a right to do it and we're not ashamed of it and we're not embarrassed. The law says we've got the right to do it and there are times when we should and this is one of them.

But give the other message to the Gardiners of the world. He's chasing a - - it's a shooting case. His life was on the line. You want to tell him that for this kind of crime the guy goes to prison? There are other crimes the life without parole is appropriate for that are less serious than murder. I mean there are a number of crimes where somebody should spent the rest of their life - -

MS. BLACK: You Honor, there is no other crime that life without parole would apply to. It is only Murder First Degree.

MR. WESTFALL: Judge, I'm giving my opinion, not stating what the law is.

MS. BLACK: It's a misstatement - -

THE COURT: Sustained.

MS. BLACK: I ask the jury be instructed to disregard that statement.

THE COURT: The jury will disregard the statement stated there are other crimes for which life without parole

is the punishment. You may proceed.

MR. WESTFALL: Don't cry for William Weaver. If you're going to shed some tears, cry for Charles Taylor and his family. We always lose sight of the victim because the victim's in the grave. All we see of the victim is a bloody picture. He lived. He had some happy moments, some sad moments. He's dead. His family - - he's gone forever. Why should William Weaver get to live? I don't understand that. Why should William Weaver get to live?

And when he did it for the reason of money, of greed, he was an agent. I mean he's was a hit man. So he was getting paid something for this. We can't prove how much or that money changed hands, but you know that from your verdict. I hope you're going to do it. I hope you've got the guts to do it.

Put in the form the aggravating circumstances that you find. All four of them apply. He was getting profit; that's number one. He was acting as an agent for the Shurns; that's number two. A Federal witness, number three. And violent wanton, inhuman - - what could be worse than the way in which Mr. Charles Taylor was killed? So put all four in your verdict. I hope that you've got the guts to do it.

THE COURT: You have three minutes remaining.

MR. WESTFALL: Thank you, Judge.

This case - - I guess it's one that just cries out to

you to say protect the community. The drug dealers, they are taking our streets away from us. Are we going to take them back? Are we going to let them have the streets or are we going to fight back? If the drug peddlers are going to run our community, then all is lost. Then there's no point in having jurors. The death penalty applies in some cases. It applies in this case.

When it comes time after Ms. Black talks to you, I'll talk to you again briefly, and then you've got to go to the jury room and you've just go to toughen up and do what's right, even though it's going to be touch. You've got to say this is bigger than William Weaver. It's not personal; it's business. Just like you did it last year; you were taking care of business. Now we're going to do it legally. We're going to do what the law says and we're going to take care of business. We sentence you to die.

CLOSING ARGUMENT ON BEHALF OF DEFENDANT

MS BLACK: Ladies and gentlemen of the jury, I'm not going to stand here and say I agree with your verdict. I'm sorry, I can't do that. Because I do still believe that William is innocent. So I can't lie to you and just stand here and say you did the right thing. Probably - - I would have to say you probably did what you believe is right. You know, I hope I can say that. I don't agree with it and I truly believe that some day, however many years away after he's been locked up assuming his life is spared, I do believe that the truth will come out. I do believe some evidence, some piece that we don't have right here, didn't have this week, maybe you didn't have the benefit of, but

I truly believe it will happen.

Buzz Westfall said something during the first part of this trial and he was talking about Mr. Wragg. And he asked Mr. Wragg, "Are you a hundred percent sure?" And Mr. Wragg said "Yes, I'm a hundred percent sure that the man had on a burgundy sweatsuit." And Westfall talked about Mr. Wragg because he dared to say he was a hundred percent sure. He called him an arrogant fool. Well, he now tells you don't look back. Give him death. You did the right thing. You're sure. But, you, it makes you think about it. Are you ever really sure?

If somebody says you did something that you know you didn't do, but the facts look otherwise - - okay? - - it looks like you're the likely one that did it, everything's pointing to you, but you know - - I mean either you did or you didn't and you know you didn't. The fact that somebody said - - or your mother. If you were a child and your mother says, "You did it; I know you did it," and you know you didn't and you get punished for it, that didn't make you do it. It just means that the evidence looked against you. I just means that your mother didn't believe you. It just means that she believed this set of facts over what you kept saying, I didn't do it. Well, it's sort of like that here.

You went back to the jury room last night and I assume if you were so positive at the beginning you would have been back in 30 minutes, all right? but you stayed out almost four hours and I - - if I have had any belief in the criminal justice system, I have to believe that you didn't go back there and get tired and just write William

Weaver off. I have to believe you talked about it. I have to believe you agonized about it or else, you know, I'll just hang up my shingle. There's no reason to have any faith anymore. So I have to believe that when you came back here you must have said, well, Ms. Black, but we can't explain the keys or, you know, we can't explain his car being there, whatever the reason was you came to that caused you to say we don't believe William.

But what did you really say there? You 12 people said we choose to believe the clothes were like this rather than what Wragg and Ducharme said, that the man had on a sweatsuit. Because it couldn't have been both. So you must have said we choose to believe this side. But what if you're wrong you see? And there is that possibility that you are wrong because you are human, too. And if you are wrong - - and this is the kind of case where you may very well be wrong. Though you're convinced, you may be wrong. And if you have said death to William Weaver, that kind of mistake can never be undone.

But if a man is locked up and the law says life - - it used to be life without parole for 50 years. They changed it. It is life without parole. Life without probation. It is life. In case you thought, well, maybe life is 12 years, oh, no, the law changed. It is life without even the possibiltiy.

And if you were wrong - - and you are human, too - - then at least - - I don't care if it's 10 years, 15 years down the line; if we find that evidence or that person that might have seen him doing the gymnastics or somebody who said after many years - - and it happens, ladies and gentlemen - - I remember that young man, or this or that, at least he's

alive. At least he's alive, you see? At least an error, a human error can be undone. But if you have said death and they have put him in that electric chair or gas chamber and they have snuffed out the last breath of his life, it doesn't matter if we find out later that he's innocent. It doesn't matter because it's too late. It's too late then.

Now, I know that you believe you did the right thing, but you may very well have made a mistake. I know the killing of Charles Taylor was bad. We cannot disagree on that. I truly believe it's a different person. You have thought otherwise. But even then, you remember when we were voir diring you as jurors and I said to you - - I said, you know, the State will say this man was shot six times in the head, didn't I? I mean I tried to describe it as graphically as I could. And I said even with that, will you consider life? And each of you 12 said yes. Because I wanted you to know when we were picking the the jury how badly this man was killed. I wanted you to know that. And some jurors said, oh, no, it would have to be death. And many of them were excused.

So if the law can say even for a crime like this that a jury may still consider life, does that mean you're terrible if you say life? Does it? Oh, no. So don't let him make you feel that, well, if you don't say death, there's no case. Oh, no, because the law even says life may be considered. The Lord created man. I believe that, at least. And I don't believe that another human should take that life and that is perhaps my philosophical view about it. But the 12 of you have said previously, Ms. Black, we can consider death, but you also said I will consider life. Some of you were leaning more towards death when we came in here and

some of you said I lean more towards life.

I ask you now when you get back to that jury room: Fight for life, because you're human. Fight for life, because we have shown mitigating circumstances. That instruction says if you find - - you can consider whether the defendant has two children and a mother in failing heath. That wasn't a show. I wanted her to testify. William said no, no, no, not my mom. She's failing in health. You may - - the law says, not Doris - - the law says you may consider that. It says you may consider whether he's worked with young people to encourage them against engaging in crime and using drugs. The law says it, not me. The law says you may consider that.

And what have you heard? You've heard from the people who say that's the William Weaver we know. Within myself, it is so inconceivable that a man who would be this person would then turn around and be a hit man and run with the drug dealers. But you've made your decision and that's fine.

But even yet, the law says if you that he - - in other words, what are they saying? Is there something salvageable about this human being? And everybody who has spoken has said about William Weaver there's something salvageable. There is good in him. We're all created with the potential for good and bad. And whatever side you use your life for, that's the side you allow to overtake the potential - - okay? - - the potential that we all have, you, me, everybody. But William has used that side of his life to reach young people.

It said you may consider after his incarceration what he's done in the jail. He's helped them to read and write. If you send him away for life, there are inmates there in Jeff City who will be out in five years, ten years. But the William Weaver that you've heard about this week could reach some of them and send them back to society a little bit better than when they went in there. He'll be there for life if you send him there. But he can reach somebody in that penitentiary who may otherwise come out and say I'm going back into crime. A William Weaver can reach them.

How do you know that? Because even in County Jail this past year, they say, "William, will you talk to this group? They are getting out." And the men respect him. He's stopped fights. He's ask, "Man, don't do that. You're just going to get yourself in trouble." They said, "William, will you help us with this man? He's disabled." He's done it. They say, "William, will you teach in the class?" He's done it. So the law says - - not me - - the law says consider what is good about this person.

When you go back to that jury room - - and they talked about don't think about their tears. Well, even lawyers are human. We feel. You come to know people. And any person who has no feelings, oh, no, you'd better look at that person a little more closely. When you go back to that jury room, fight for life. And while I'm not saying chastise yourself or anything, realize and understand that it it's life, he can reach someone. If it's life and we were mistaken, it can be corrected. But if it's death, it is final. If it's death, those two young children have no father. If it's death, it won't bring Charles Taylor back. But you can salvage another human life.

Vote. Vote for life. Fight for it. Always fight for life, always. Always.

And he'll try to mention all about the hit man when he comes back and he didn't give Taylor a chance. And I'm not saying what happened to Taylor was right. But if you vote for life, you are still doing your duty. If you vote for life, you are sending a message. Because nobody loves being incarcerated and nobody would want to be locked up for life, never to see the sun or touch a tree if you want to. Nobody wants that. One - - I don't know which juror said it. One juror said it's almost a living death as I see it. And she's right. It is like a living death. And you're behind these bars so you're away from society and society is protected because you don't come back, you see. So you don't have that concern. You've sent your message. You've done your job.

Please, I beg you for William and for his family and his friends, Reverend Schroeder and those people who know that man, spare his life. Thank you.

THE COURT: Mr. Westfall, you have 14 minutes remaining.

FINAL SUMMATION ON BEHALF OF THE STATE

MR. WESTFALL: And I'm going to beg you for the entire community and for society not to spare his life. I'm going to beg you for the right message instead of the wrong message. The right message is life? For an

execution? That's the right message? That's the message you want to send to the drug dealers, the dope peddlers and the hit men they hire to do their dirty deeds: Life in prison is what you get when we catch you and convict you. Life in prison? That's the message you want to send to the scum of the world? That when we catch you and we're convinced your guilty, we're going to give you life in prison? That's not the right message.

Prison doesn't scare these people. Death would scare them. They surrendered at the moment of truth. When Shurn was told by Gardiner stop, he knew he was going to get blown away. Did he stop? Well, did you think he didn't think that he'd end up going to prison. He was caught moments after the murder. He knew he'd go to prison, but he stopped because he doesn't want to get killed. William Weaver doesn't want to die. Charles Taylor didn't want to die.

William Weaver when he saw Crain, he's too tired to run anymore. He's too tired, so he tried to talk his way out of it. Was he going to run? I mean when Crain said, "I'm going to have to take you in," did he bolt? No. He wants to live. The message has to be death for these types of people. That's the only message they are going to understand.

The one thing you've got to get into your head, this is far more important than William Weaver. This case goes far beyond William Weaver. This touches all the dope peddlers and the murderers in the world. That's the message you have to send. It just doesn't pertain to William Weaver. It pertains to all of us, the community.

They are our streets, our neighborhoods, our family. The message is death, not life. And you've just got to geer yourself to that.

Yeah, there's a possibility your verdict could be wrong. Does that mean we shouldn't ever sentence anybody to die? That's the only logical result from that argument. That's what that means: Because there is a remote possibility we could be wrong, therefore, society never has the right to sentence anybody to die. All twelve of you said you agree with the death penalty, that you could impose it in the right case. Well, you're never a hundred percent sure of anything.

So, yeah, is there a possibility he's innocent? A possibility. I'm not going to deny that. But that's not what's required by the law and that's not what we could live by. If that's required, nobody would ever be sentenced to die. We wouldn't have a death penalty. And, quite frankly, if you don't sentence him to die in this case, there's no point in having a death penalty.

MS. BLACK: Objection, Your Honor. That's improper argument to the jury. It's a misstatement of the law as well.

THE COURT: Sustained.

MS. BLACK: I ask the jury to be instructed to disregard the statement of counsel.

THE COURT: The jury will disregard the last comment of Mr. Westfall.

MR. WESTFALL: We can't bring Charles Taylor back to life, but we can save other lives. The death penalty deters. I'm convinced of that. People can argue for a thousand years whether it does or not, but I'm convinced it does. It doesn't deter passion killings. It doesn't deter crazed people who kill. But it deters business killings like this. If some of those people really thought they faced the prospect of a death penalty, some of them wouldn't do it.

How do I prove to you with statistics how many lives were saved? I mean the old analogy is a lighthouse. I don't know how many shipwrecks a lighthouse prevents because we don't have statistics on those that don't occur. If it doesn't occur, it doesn't go down on paper. Yet, many shipwrecks are avoided because of a lighthouse. If a death penalty can save a life, we don't know because the murder won't occur. We don't have statistics of the innocent victims that might be saved instead of being killed at the hands of a convicted murderer.

William Weaver - - no tears all during the trial, but tears today. Naturally. He doesn't want to die. Same reason he surrendered to Officer Crain. He didn't want to get shot. He'd rather go to prison. You've got to think beyond William Weaver. As I told you earlier, this is our worst nightmare. This is society's worst nightmare. If they could kill witnesses and we don't execute them in exchange, then there's no deterrence. Then the whole system fails and then chaos reigns and our streets are never safe. The dope peddlers reign and people like William Weaver do.

I can't explain to you some of these good things he

does. I'll have to assume he does some of them. I suppose he's got one part of his life as a model citizen; but in the other part of his life, he's a hit man. When you want it done, they come to me. I'm good. I'm a hit man.

You've made you decision. Don't worry about it. You can't worry about the possibility that he's innocent. Because if you do that, then we wouldn't have a death penalty. Because that possibility always exists. And, yet, you twelve people said you could do it. In the right case, you said you could do it.

What remorse? The man still says he didn't do it. He's still lying to you. Rehabilitation? He isn't even sorry he did it. He's still lying to you.

MS. BLACK: Your Honor, he didn't do it and so, therefore, he has no reason to say he did.

THE COURT: If that's an objection - -

MS. BLACK: That's an objection as improper closing argument.

THE COURT: It is overruled.

MR. WESTFALL: He did do it. He did do it. He and Shurn went out there to kill Charles Taylor. They would have done it in his apartment where they would never have gotten caught, but things didn't work right. So they chase him across the field, gun him down like an animal. They are out of bullets. They are checking on him. Jean Henson told you that. Then they go back to the

car. He reloads. This man reloads. You know he did it. And he runs down and puts - - bam, bam - - three or four more shots right in his head, a dying man's head. They can't leave him alive because he knows Shurn. He may never have seen Weaver before, but he knows Shurn. So Weaver goes down and finishes him off, blows his brains out.

I don't doubt that Weaver didn't know Charles Taylor. Weaver doesn't have to know his victims. He's the hit man. And don't lose sight of the fact that he's the one that Shurn knows and the Shurns are big time criminals. And they chose William Weaver to do the job.

MS. BLACK: Your Honor, there is no evidence that the Shurns chose William Weaver. That is improper argument and it is not supported by any evidence in this case.

THE COURT: Overruled.

MR. WESTFALL: He was out there with Daryl Shurn killing a witness against Daryl Shurn's brothers. And you see other photographs of him with Larry Shurn. And you know they are friends. They are business associates. You're not fooled by that. So he's still lying to you. No remorse, not then, not now, not ever.

It's bigger than William Weaver. And you've got to have the guts to do it. I'm the Prosecuting Attorney in this county, the top law enforcement office in the county. I decide in which cases we ask for the death penalty and in which cases we don't.

MS. BLACK: Objection, Your Honor. This is personalizing this case and it's improper closing.

THE COURT: Sustained.

MS. BLACK: I ask the jury to be instructed to disregard it.

THE COURT: The jury will disregard the last comment of Mr. Westfall.

MR. WESTFALL: Then I'll say what I said earlier. If these facts don't justify, don't cry out for the death penalty, then which facts do? If a cold-blooded hit on behalf of drug scum isn't enough for the death penalty, then what facts justify it?

I know there's a movie, Patton, and in the movie, George Patton was talking to his troops because the next day they going to go out in battle and they were scared young soldiers. And he's explaining to them that I know that some of you are going to get killed and some of you are going to do some killing tomorrow morning. And they all knew that. And he was going to try to encourage them that sometimes you've got to kill and sometimes you've got to risk death because it's right. He said: But tomorrow when you reach over and put your hand in a pile of goo that a moment before was your best friend's face, you'll know what to do.

MS. BLACK: Objection, Your Honor. This is improper closing, to inflame and prejudice this jury by using that example in that particular movie.

MR. WESTFALL: Judge, it's just an analogy.

THE COURT: Overruled.

MR. WESTFALL: He said, "You'll know what to do." Well, last July, Charles Taylor's face was a pile of goo and his brains were hanging out. You know what to do. Yesterday, you made the decision with you brain and you made the right decision. Today, you've got to reach down into your belly, because that's where the death penalty comes from; it comes from your belly. You've got to reach down there and say, William Weaver, we sentence you to die. You know what to do. Please have the courage to do it. Thank you.

Trial Transcript 1756-83.

Penalty Phase Jury Instructions in State of Missouri v. William L. Weaver, No. 565118 (St. Louis County Circuit Court)

INSTRUCTION NO. 20

The law applicable to this stage of the trial is stated in these instructions and instructions numbered 1 and 2 which the Court read to you during the first stage of the trial. All of these instructions will be given to you to take to your jury room for use during your deliberations on punishment.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law.

The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

In these instructions, you are told that in order to consider the death penalty, you must find beyond a reasonable doubt certain propositions relating to aggravating circumstances. The burden of causing you to find these propositions beyond a reasonable doubt is upon the state.

A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the truth of a proposition. The

law does not require proof that overcomes every possible doubt. If, after your consideration of all the evidence, you are firmly convinced that a proposition is true, then you may so find. If you are not so convinced, you must give the defendant the benefit of the doubt and must not find such proposition to be true.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION NO. 21

You found the defendant guilty of murder in the first degree. At this state of the trial it will be your duty to determine within the limits prescribed by law the punishment which must be imposed for that offense.

The punishment prescribed by law for murder in the first degree is either death or imprisonment for life by the Division of Corrections without eligibility for probation or parole.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION NO. 22

At this state of the trial, the law requires that certain circumstances be considered in making your decision as to the punishment to be imposed. We will proceed as follows:

First, the attorneys will have an opportunity to make a statement outlining any additional evidence to be presented. Such evidence may then be introduced.

After that, the Court will instruct you as to the circumstances you should consider in determining the punishment.

Then the attorneys may make their arguments.

You will then go to the jury room, deliberate and arrive at your verdict.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION NO. 23

In determining the punishment to be assessed against defendant for the murder of Charles Taylor, you must first unanimously determine whether on or more of the following aggravating circumstances exists:

1. Whether the defendant murdered Charles Taylor for the purpose of the defendant receiving money or any other thing of monetary value from Charles Taylor or another person.

2. Whether the defendant, as an agent or employee of another person or persons and at their direction, murdered Charles Taylor.

3. Whether the murder of Charles Taylor involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

4. Whether Charles Taylor was a potential witness in past or pending prosecutions of Charles Shurn, and/or Larry Shurn in Federal Court and was killed as a result of his status as a potential witness.

You are further instructed that the burden rests upon the state to prove at least one of the foregoing circumstances beyond a reasonable doubt. On each circumstance that you find beyond a reasonable doubt, all twelve of you must agree as to the existence of that circumstance.

Therefore, if you do not unanimously find from the

evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

A-306

INSTRUCTION NO. 24

If you find and believe from the evidence beyond a reasonable doubt that one or more of the aggravating circumstances submitted in Instruction No. 23 exist, it will then become your duty to decide whether the aggravating circumstances are sufficient to warrant the imposition of death as punishment of defendant. In deciding that question, you may consider:

1. All of the evidence relating to the murder of Charles Taylor.

2. Any of the aggravating circumstances referred to in Instruction No. 23 which you found beyond a reasonable doubt.

If you do not unanimously find from the evidence beyond a reasonable doubt that those aggravating circumstances you have found warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION 25

If you decide that one or more sufficient aggravating circumstances exist to warrant the imposition of death, as submitted in Instruction No. 23, you must then determine whether one or more mitigating circumstances exist which outweigh the aggravating circumstance or circumstances so found to exist. In deciding that question, you may consider all of the evidence relating to the murder of Charles Taylor.

You may consider:

1. Whether the defendant has no significant history of prior criminal activity.

2. Whether the defendant was an accomplice in the murder of Charles Taylor and whether his participation was relatively minor.

3. Whether the defendant acted as an accomplice and was not the trigger man.

4. The defendant has two young children and has a mother in failing health.

5. Whether the defendant has worked with young people in encouraging them to stay out of trouble and avoid drugs.

6. Whether the defendant, after his incarceration, has worked with inmates in teaching them reading and language skills, and assists inmates with disabilities.

7. Whether the defendant, since his incarceration, has been given responsibilities of trustee, indicating traits of character showing cooperation, helpfulness and a willingness to work within the confines of authority.

You may also consider any circumstances which you find from the evidence in mitigation of punishment.

If you unanimously find that one or more mitigating circumstances exist sufficient to outweigh the aggravating circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

A-309

INSTRUCTION NO. 26

You are not compelled to fix death as the punishment even if you do not find the existence of one or more mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances which you find to exist. You must consider all the circumstances in deciding whether to assess and declare the punishment at death. Whether that is to be your final decision rests with you.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION NO. 27

You will be provided with forms of verdict for your convenience. You cannot return any verdict as the verdict of the jury unless all twelve jurors concur in and agree to it, but it should be signed by your foreman alone.

If you unanimously decide, after considering all of the evidence and instructions of law given to you, that the defendant must be put to death for the murder of Charles Taylor, your foreman must write into your verdict all of the aggravating circumstances submitted in Instruction No. 23 which you found beyond a reasonable doubt.

If you unanimously decide, after considering all of the evidence and instructions of law, that the defendant must be punished for the murder of Charles Taylor by imprisonment for life by the Division of Corrections without eligibility for probation or parole, your foreman will sign the verdict form so fixing the punishment.

When you have concluded your deliberations you will complete the applicable form to which all twelve jurors agree and return it with all unused forms and the written instructions of the Court.

If, after due deliberation, you are unable to agree upon the punishment, your foreman will sign the verdict form so stating. In such case, the Court will fix the defendant's punishment at death or at imprisonment for life by the Division of Corrections without eligibility for probation or parole. You will bear in mind, however, that under the law, it is the primary duty and responsibility of

the jury to fix the punishment.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

INSTRUCTION NO. 28

The attorneys will now have the opportunity of arguing the case to you regarding the punishment to be imposed. Their arguments are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You will bear in mind that it is your duty to be governed in your deliberations by the evidence as you remember it, the reasonable inferences which you believe should be drawn therefrom, and the law as given in these instructions.

It is your duty, and yours alone, to render such verdict under the law and the evidence concerning the punishment to be imposed as in your reason and conscience is true and just.

The state's attorney must open the argument. The defendant's attorney may then make his argument. The state's attorney may then reply. No further argument is permitted by either side.

GIVEN

Date July 20, 1988

Alphonso H. Voorhees
Judge, Div. 13

STATE OF MISSOURI)
) SS.
COUNTY OF ST. LOUIS)

IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS, MISSOURI

STATE OF MISSOURI,	)	
Plaintiff,	)	Cause No. 565118B
vs.	)	
WILLIAM WEAVER,	)	Div. No. 13
Defendant.	)	

VERDICT

(Jurors: Use this form only if the punishment you now assess and declare is death. See Instruction No. 27 for directions as to what must be written on this verdict form. The foreman's signature must appear after the aggravating circumstance or circumstances.)

We, the jury, having found the defendant William Weaver guilty of murder in the first degree of Charles Taylor, now assess and declare the punishment at death. We have found the following aggravating circumstance or circumstances beyond a reasonable doubt:

The aggravating circumstances are as follows:

#2 Whether the defendant, as an agent or employee of another person or persons and at their direction, murdered Charles Taylor.

#3 Whether the murder of Charles Taylor involved depravity of mind and that as a result thereof it was outrageously or wantonly vile, horrible, or inhuman.

#4 Whether Charles Taylor was a potential witness in past or pending prosecutions of Charles Shurn and/or Larry Shurn in Federal Court and was killed as a result of his statute as a potential witness.

\s\ Shirley Turner